No. 87-1064-CFX
Status: GRANTED

Title: United States, Petitioner
v.
Philip George Stuart, Sr., et al.

Docketed:
December 23, 1987

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: McEachron,Brian L.

Entry	Date	Note	Proceedings and Orders
1	Nov 13 1987		Application for extension of time to file petition and order granting same until December 24, 1987 (O'Connor, November 18, 1987).
2	Dec 23 1987	G	Petition for writ of certiorari filed.
3	Jan 27 1988		DISTRIBUTED. February 19, 1988
4	Feb 9 1988	F	Response requested -- CJ.
5	Feb 26 1988		Order extending time to file response to petition until April 11, 1988.
6	Apr 8 1988		Brief of respondents Philip G. Stuart, Sr., et al. in opposition filed.
7	Apr 13 1988		REDISTRIBUTED. April 29, 1988
8	May 2 1988		Petition GRANTED.
			**********
9	May 26 1988		Record filed.
		*	Certified copy of original record and proceedings, 2 volumes, received.
11	Jun 13 1988		Order extending time to file brief of petitioner on the merits until July 15, 1988.
12	Jul 15 1988		Order further extending time to file brief of petitioner on the merits until July 22, 1988.
13	Jul 18 1988		Joint appendix filed.
14	Jul 22 1988		Brief of petitioner United States filed.
16	Aug 19 1988		Order extending time to file brief of respondent on the merits until September 26, 1988.
17	Sep 26 1988		Brief of respondents Philip G. Stuart, Sr., et al. filed.
18	Sep 30 1988		Set for argument. Monday, December 5, 1988. (1st case)(1 hr.)
19	Oct 7 1988	X	Reply brief of petitioner United States filed.
20	Oct 7 1988		CIRCULATED.
21	Dec 1 1988	X	Supplemental brief of respondents Philip G. Stuart, et al. filed.
22	Dec 5 1988		ARGUED.

87 1064

No.

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP GEORGE STUART, SR., AND MONS KAPOOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether, in issuing an administrative summons pursuant to a request for information made by a tax treaty partner, the Commissioner of Internal Revenue is required to state that the foreign tax investigation has not reached a stage analogous to a domestic tax investigation's referral to the Justice Department for criminal prosecution.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 813 F.2d 243. The enforcement orders of the district court (App., *infra*, 25a-26a, 34a-35a) and the opinions of the magistrate (App., *infra*, 27a-33a, 36a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 22a-23a) was entered on March 24, 1987. A timely petition for rehearing was denied on August 27, 1987 (App., *infra*, 24a). On November 18, 1987, Justice O'Connor extended the time to petition for a writ of certiorari to and including December 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND TREATY INVOLVED

Articles XIX and XXI of the Convention Respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1405-1406, and Section 7602 of the Internal Revenue Code (26 U.S.C.) are set out in a statutory appendix (App., *infra*, 42a-46a).

STATEMENT

1. Section 7602(a) of the Internal Revenue Code[1] gives the Commissioner the authority to summon papers and witnesses for examination for the purpose of ascertaining tax liabilities. The district courts are empowered to enforce summonses upon a prima facie showing by the Commissioner that the summons was issued in good faith. I.R.C. § 7604; *United States* v. *Powell*, 379 U.S. 48, 57-59 (1964). Section 7602(c) of the Code, added by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 333(a), 96 Stat. 622, provides that a summons may not be issued when there is in effect a referral to the Justice Department for criminal prosecution.[2] Such a referral is defined by the statute as being in effect if (1) the IRS has recommended a grand jury investigation or

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

[2] This requirement first arose out of this Court's decision in *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978). The Court there held (5-4) that the IRS may issue a summons as long as it has not made a Justice Department referral and has "not abandon[ed] in an institutional sense * * * the pursuit of civil tax determination or collection" (*id.* at 318). The dissenting Justices argued for a bright-line test turning entirely upon whether a recommendation for prosecution has already been made to the Justice Department (*id.* at 320-321 (Stewart, J., dissenting)). The TEFRA amendments essentially adopted the dissenting position. TEFRA also added Section 7602(b), which made explicit that a inquiry into the possibility that a criminal offense has been committed is a legitimate purpose for the issuance of a summons.

prosecution to the Justice Department or (2) the Justice Department has requested otherwise confidential return information from the IRS for use in a criminal tax investigation.

The United States has entered into tax treaties with other nations that provide, among other things, for the exchange of information to assist each other in administration of the tax laws. In accordance with these treaties, the IRS may issue a summons to obtain information at the request of a treaty partner. The information exchange agreement between the United States and Canada that is applicable to this case is found in Articles XIX and XXI of the Convention Respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1405, 1406 [hereinafter 1942 Convention]. Article XIX provides that each country undertakes to furnish to the other "information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws" and that may be of use in the assessment of tax liabilities. Article XXI provides that the Canadian Minister may seek the cooperation of the Commissioner of Internal Revenue who "may furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States."[3]

[3] These treaty provisions have been held to contemplate use of domestic summons enforcement procedures by the Commissioner of Internal Revenue to assist a treaty partner in a foreign tax investigation even though no United States taxes are involved. See, *e.g.*, *United States* v. *A.L. Burbank & Co.*, 525 F.2d 9 (2d Cir. 1975), cert. denied, 426 U.S. 934 (1976). We note that a new Income Tax Convention between the United States and Canada became effective after the issuance of the summonses involved in this case (see 1 Tax Treaties (CCH) ¶ 1301 (1984)). Article XXVII of the new Convention (¶ 1317k), effective with respect to taxes for taxable years beginning on or after January 1, 1985, contains language relating to exchange of information that is essentially indistinguishable from the language contained in Articles XIX and XXI of the 1942 Convention.

2. Respondents are citizens and residents of Canada who have bank accounts with the Northwest Commercial Bank in Bellingham, Washington. The Canadian Department of National Revenue (Revenue Canada)—the Canadian equivalent to the Internal Revenue Service (IRS)—is attempting to determine respondents' income tax liabilities under Canadian law for tax years 1980, 1981, and 1982. Revenue Canada, acting pursuant to the 1942 Convention, requested in January 1984 that the IRS obtain and provide bank records necessary to the determination of respondents' Canadian tax liabilities for the tax years in question. App., *infra*, 2a.

Thomas J. Clancy, IRS Director of Foreign Operations, was at that time the "competent authority" (see Art. XIX) for the United States with respect to such tax treaty information requests. Director Clancy determined that the Canadian requests for information were within the scope of the treaty and that it was appropriate for the United States to honor the requests. Accordingly, on April 2, 1984, the IRS served administrative summonses for the requested information on the Northwest Commercial Bank. App., *infra*, 2a-3a.

3. Respondents received notice of the summonses and directed the bank not to comply. Pursuant to Section 7609 of the Internal Revenue Code, they then petitioned the district court to quash the summonses, raising three claims: (1) the summonses were not issued for lawful purposes; (2) the summonses did not seek information relevant to any inquiry concerning an internal revenue tax of the United States; and (3) the information sought could be obtained directly by Revenue Canada under Canadian law. The United States filed oppositions to the petitions to quash, together with motions for summary enforcement, and supported those filings with affidavits from Director Clancy. He stated therein that he had decided to honor the Canadian requests and to issue the summonses because:

(1) the requested information may be relevant in determining respondents' tax liability; (2) the same type of information can be obtained by Canadian tax authorities under Canadian law; and (3) the information requested was not already in the possession of the IRS. Director Clancy also declared that Revenue Canada had requested the information to determine the correct tax liabilities of respondents pursuant to a "criminal investigation, preliminary stage" and that he had determined that Revenue Canada's requests were within the scope of the treaty. App., *infra*, 2a-3a.

A magistrate held a consolidated hearing on the petitions to quash and recommended that the district court enforce both of the summonses (App., *infra*, 27a-33a, 36a-42a). Over respondents' objections to the magistrate's recommendations, the district court ordered the bank to comply with the summonses (*id.* at 25a-26a, 34a-35a).

4. The enforcement orders were stayed pending appeal, and the court of appeals reversed by a 2-1 vote (App., *infra*, 1a-21a). The court held that the affidavits submitted did not sufficiently demonstrate that the summonses were issued in "good faith" as required under United States law (see *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); App., *infra*, 8a-14a). Accordingly, the court ruled that the treaty did not require that the summonses be enforced because of a failure to satisfy the condition that the information sought be information that "the Commissioner is entitled to obtain under the revenue laws of the United States of America" (Art. XXI).

Specifically, the court stated that one of the elements of good faith for domestic summonses is the requirement that there has been no referral to the Justice Department for criminal prosecution. See I.R.C. § 7602(c). The court then rejected the government's argument that this requirement did not apply to summonses issued at the request of a

treaty partner, an argument that the court acknowledged had been accepted by the Second Circuit in *United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d 47, 49-53 (1983). See App., *infra*, 9a-11a. The Second Circuit had held that, in light of the significant differences between the U.S. and foreign legal systems, the legitimate purpose inquiry for treaty summonses should not necessarily incorporate all of the features of that standard developed for domestic cases. In particular, the Second Circuit explained that the policy considerations that underlie the prohibition against post-referral summonses—namely, concern about infringing on the role of grand juries and about expanding discovery powers in criminal prosecutions—simply have no relevance to a Canadian investigation of a Canadian citizen with respect to his Canadian tax liabilities. 703 F.2d at 52. The court below did not address these points. It simply stated that it "decline[d] * * * to adopt *Manufacturers and Traders Trust Co.*[,]" noting that the statutory codification of the prohibition on post-referral summonses had eliminated the need to delve into the "institutional good faith" of a foreign government (App., *infra*, 11a).[4]

Instead, the court below ruled that the good faith doctrine applies to treaty summonses to the same extent that it applies to domestic summonses. The court then held that "in order to establish its prima facie case by affidavit, the IRS must make an affirmative statement that the investigation has not reached a stage analogous to a Justice Department referral" (App., *infra*, 13a). The court stated that such a rule is preferable to placing the burden of proof on the taxpayer because the IRS is in the best posi-

[4] The summons at issue in *Manufacturers* had been issued prior to the effective date of the TEFRA amendments, and therefore the majority opinion in *LaSalle Nat'l Bank* was still the law.

tion to "consult with Canada's competent authority" and "to have greater familiarity with Canadian administrative procedures" (*ibid.*). The court concluded that "it was clear error to find that the affidavits made a prima facie showing of legitimate purpose" (*id.* at 14a).

Judge Wright dissented (App., *infra*, 17a-21a). He stated that Director Clancy's affidavit had made a prima facie showing of good faith that was not refuted by respondents. The dissent criticized the majority for "creat[ing] an additional requirement for the good faith showing," namely, the requirement that the IRS affirmatively state that the foreign criminal investigation has not reached a stage analogous to a Justice Department referral (*id.* at 18a-20a). The dissent also concluded that the majority did not offer "sound bases" for rejecting *Manufacturers* (*id.* at 19a) and thus that the decision below "creates an unnecessary intercircuit split, imposes new burdens on the competent authority and meddles unnecessarily in Canadian internal affairs" (*id.* at 17a).[5]

REASONS FOR GRANTING THE PETITION

The court of appeals has erroneously decided an important question of law pertaining to our tax treaty obliga-

[5] The dissent also criticized (App., *infra*, 20a-21a) the majority's refusal to consider certain supplemental legal materials submitted by the government. In response to questions raised for the first time at oral argument concerning the burden of proof on the referral issue, the government had submitted supplemental case law showing that the taxpayer bears the burden of proof on this issue. The government also had submitted certain foreign law materials showing that Revenue Canada had not yet made the equivalent of a Justice Department referral in this case. The majority refused to consider these materials because the government had failed to seek leave of the court before filing the domestic law materials (see Fed. R. App. P. 28(c) and (j)) and because the court believed that, in fairness to respondents, the foreign law materials should have been submitted no later than in the appellate brief (App., *infra*, 14a-15a).

tions. The court has concluded that United States cooperation with foreign tax investigations is limited by all restrictions applicable to summonses issued in domestic investigations, and it has applied to tax treaty summonses the standards that are grounded entirely in internal policies that bear no relevance to practices in the treaty partner's jurisdiction. In so doing, the court of appeals has imposed upon government enforcement of IRS summonses a new condition that marks a departure from congressional intent and from well established law.

The error committed by the court of appeals is of great importance because its practical effect would be to impair the reciprocal cooperation of our tax treaty partners and to impede the flow of information under the exchange of information provisions of tax treaties. Moreover, the decision below directly conflicts with the decision of another court of appeals, thus creating the likelihood that indistinguishable foreign requests for tax information will yield different results depending upon the circuit in which they arise, and perhaps giving the impression that the United States judicial system favors one foreign country over another. It is therefore appropriate for this Court to grant certiorari.

1. As the court of appeals candidly acknowledged (App., *infra*, 11a), it "decline[d] * * * to adopt" the Second Circuit's decision in *United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d 47 (1983), and its refusal to do so has created a square conflict in the circuits. That case, like this one, involved summonses issued by the IRS pursuant to an information request by Revenue Canada under Articles XIX and XXI of the 1942 Convention. In *Manufacturers*, the taxpayers under investigation by Revenue Canada were also under criminal investigation by the Royal Canadian Mounted Police, and the two agencies of the Canadian government freely exchanged information, as permitted by Canadian law. The district court refused to enforce the IRS summonses, concluding that they were issued in bad faith because the Canadian tax officials who had initiated the treaty request intended to share the information received with the Royal Mounted Police.

The Second Circuit reversed and ordered the summonses enforced. The court observed that the summonses probably could not be enforced if the matter had been purely domestic because of the policy against utilization of an IRS summons to acquire evidence for a pending criminal prosecution (703 F.2d at 49-50). The court concluded, however, that, for "international purposes, the requirements for summons-enforcement are not in all respects precisely the same as for domestic cases and that here the Government has satisfied all the standards applicable under the Convention" (*id.* at 50). The court explained that the "dominant condition" for a request under the treaty is that Revenue Canada be considering the determination of a person's income tax liability under Canadian law, and that condition was clearly satisfied (*ibid.*).

The court specifically discussed whether the fact that the information would be used partially for Canadian criminal investigatory purposes posed a bar to enforcement of the summons. The court noted that Canadian law imposed no restriction on such use, and it held that the United States prohibition on such use in domestic cases does not apply in the treaty context. 703 F.2d at 50-51. The court explained that the restriction on issuance of domestic summonses following a referral for criminal prosecution "stems from special provisions of United States law"—namely those that center criminal prosecutions in the Department of Justice, rather than the IRS, and those that make the grand jury the focus of prosecution discovery (*id.* at 52). "This policy is wholly internal * * * [and] is not applicable to Canada which does not

have our marked separations and does not normally use the grand jury" (*ibid.*). The court continued (*ibid.*): "The United States has no interest in thrusting its policy (in this regard) into Canadian prosecutions, Canada has no interest in having that policy applied to its taxpayers, and * * * a Canadian taxpayer * * * has no right to expect that he will have the protection accorded by this country to its own taxpayers and potential defendants." The court added that "Canada might consider it a failure on this country's part to comply with the treaty's commitment if enforcement of the summonses were refused on grounds Canada does not recognize in its own territory or with respect to its own income taxes" (*id.* at 52-53).

The decision below, which held that the criminal referral restriction in Section 7602(c) of the Code fully applies to IRS summonses issued pursuant to treaty requests, squarely conflicts with *Manufacturers*. The affidavits submitted by Director Clancy here manifestly would have satisfied the standards for treaty summonses set forth in *Manufacturers*, but the court here held that it was "clear error to find that the affidavits made a prima facie showing of legitimate purpose" (App., *infra*, 14a). To the extent the decision below may be read to suggest that *Manufacturers* might be decided differently today in light of TEFRA (see *id.* at 11a), that suggestion is wholly without merit. TEFRA explicitly reaffirmed that the purposes for which a summons may be used "include the purpose of inquiring into any offense" in connection with the tax laws (26 U.S.C. 7602(b)), while adopting the "bright line" standard of the dissent in *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978)—*i.e.*, the standard that a summons may not be issued after *the IRS* has made a criminal referral *to the U.S. Department of Justice*, but that there is not to be an additional open-ended inquiry into the "institutional good faith" of the IRS (see note 2, *supra*). Accordingly, the TEFRA amendments in no way

would have affected the analysis in *Manufacturers*, which focused entirely upon the criminal referral restriction.[6] Indeed, in enacting TEFRA Congress specifically identified the concerns underlying the referral restriction as the same ones discussed by the Second Circuit in *Manufacturers*—noting that it did not intend "to broaden the Justice Department's right of criminal discovery or to infringe on the role of the grand jury as a principal tool of criminal prosecution" (1 S. Rep. 97-494, 97th Cong., 2d Sess. 286 (1982)).[7] Hence, there can be no doubt that the *Manufacturers* decision remains fully viable today in the wake of TEFRA, and thus, as Judge Wright correctly stated, the decision below "creates an intercircuit conflict" (App., *infra*, 19a).

2. The decision of the court of appeals in this case is erroneous in several respects. It misinterprets the standards governing the enforcement of treaty summonses by mistakenly importing domestic policy concerns into an international context in which they should play no role. More generally, the court's opinion fails to follow recognized principles of treaty interpretation in construing the language of the Convention. Finally, the unprecedented requirement imposed by the court that the IRS affirmatively show that the treaty partner's criminal investigation has not reached a stage analogous to a

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[6] The court of appeals' suggestion that the Second Circuit's decision in *Manufacturers* was premised on its "reluctan[ce] to delve into the institutional good faith of Revenue Canada" (App., *infra*, 11a) is entirely without foundation. There is no hint in the Second Circuit's opinion of any consideration of a possible "institutional good faith" inquiry; rather, the opinion focuses exclusively on the appropriateness of importing the criminal referral restriction into the treaty summons context—a restriction that is common to both the majority and dissenting opinions in *LaSalle Nat'l Bank* and to the TEFRA amendments.

[7] Congress took this language directly from this Court's opinion in *LaSalle Nat'l Bank* (see 437 U.S. at 312), which was the focus of the analysis in *Manufacturers*.

Justice Department referral is at odds with well-settled principles governing the burden of proof in summons enforcement proceedings.

a. An administrative summons issued by the IRS will not be enforced unless it is issued in "good faith." The basic requirements for establishing good faith were set forth by this Court in *United States* v. *Powell*, 379 U.S. 48 (1964). The IRS "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already in the Commissioner's possession, and that the administrative steps required by the Code have been followed" (*id.* at 57-58).

In *United States* v. *LaSalle Nat'l Bank, supra*, the Court considered whether there was an additional requirement that would limit the use of administrative summonses as a criminal investigative tool The Court concluded that Section 7602, as in effect at that time, did not authorize the use of a summons for the sole purpose of advancing a criminal investigation (see 437 U.S. at 316 n.18). The Court held that "the primary limitation on the use of a summons occurs upon the recommendation of criminal prosecution to the Department of Justice" (*id.* at 311); it also held that a summons cannot issue if the IRS as an institution has abandoned the pursuit of civil tax determination or collection (*id.* at 318). This latter restriction was eliminated by Congress in TEFRA in 1982 when it authorized in Section 7602(b) the use of a summons for investigating tax offenses, while it codified in Section 7602(c) the prohibition on issuance of a summons after a Justice Department referral.

The Court in *LaSalle Nat'l Bank* explained that the rationale for the criminal referral restriction derived from the division of authority in our system for the conduct of criminal investigations and prosecutions. Specifically, the Court found that Congress did not intend that the sum-

mons power be used "to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation" (437 U.S at 312; see also *id.* at 313 n.15). The Court pointed to the fact that a referral to the Justice Department is necessary to allow a criminal prosecution to proceed and that such a referral deprives the IRS of its ability to compromise both the criminal and civil aspects of a fraud case. At that point, the Court concluded, the degree of necessary information exchange between the two agencies would be such that IRS use of information to determine civil liability "would inevitably result in criminal discovery" (*id.* at 312). Moreover, in enacting TEFRA, Congress adverted to these same concerns identified by the Court in *LaSalle*—resisting the expansion of criminal discovery by the Justice Department and intrusion into the role of the grand jury (1 S. Rep. 97-494, *supra*, at 286).

These domestic policy considerations plainly are of no relevance to the enforcement of treaty summonses. When a summons issued at the request of a treaty partner is enforced, there can be no encroachment upon the function of the institution of the grand jury in this country nor is there an expansion of the Justice Department's discovery power. In accordance with our treaty obligations, the information is simply provided to a foreign government, which uses it for its own domestic purposes in accordance with its own laws. In the case of Canada, for example, the institution of the grand jury has been abolished (except in limited circumstances in Nova Scotia), and all crimes are charged by information. See 2 Can. Rev. Stat. ch. 34, § 507 (1970). And the Canadian system permits information sharing between agencies in criminal investigations; Section 241(4) of the Canadian Income Tax Act, 5 Can. Tax Rep. (CCH) ¶ 27,742 (1987), provides that, for any purpose related to the revenue, the Minister may disclose

to any authorized person of the Canadian Government any materials obtained by him in the course of his investigation. See also *Manufacturers*, 703 F.2d at 51.

Thus, the rule adopted by the court below advances no discernible policy interest, either of the United States or of Canada. Canadian taxpayers who use banks in this country have no right to expect that the restrictions afforded against criminal discovery by this country for purposes of its own law enforcement activities will apply to them in connection with a Canadian investigation of their Canadian tax liabilities. As the Second Circuit said in *Manufacturers*, "[t]he United States has no interest in thrusting its policy (in this regard) into Canadian prosecutions, [and] Canada has no interest in having that policy applied to its taxpayers" (703 F.2d at 52). On the other hand, while the decision below advances no legitimate policy interest, it does have the deleterious effect of inhibiting the exchange of tax information provided for in the Income Tax Convention with Canada. In sum, the decision below is erroneous because it requires a treaty partner's tax investigation to meet standards grounded in domestic policies that have no application in the treaty partner's jurisdiction, and because it unnecessarily hinders investigations that the United States has pledged by treaty to assist and that are entirely proper under the laws of the treaty partner.[8]

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[8] Moreover, the rule adopted by the court of appeals injects a new and complex issue into summons proceedings—the comparison of the various stages of a foreign tax investigation with our own very different system. It was precisely the desire to prevent this type of amorphous inquiry that prompted Congress in TEFRA to adopt the bright-line test of the *LaSalle Nat'l Bank* dissent and eliminate the inquiry into "institutional good faith." Thus, the decision below runs counter to Congress's expressed desire to eliminate "protracted litigation" and "to simplify administration of the [tax] laws" (1 S. Rep. 97-494, *supra*, at 285-286).

b. The decision below also contravenes established principles of treaty interpretation. The holding of the court of appeals seems to rest implicitly upon the conclusion that the treaty phrase "such information * * * as the Commissioner is entitled to obtain under the revenue laws of the United States" (Art. XXI) does not cover situations where the foreign country's criminal investigation has reached a stage analogous to a Justice Department referral (see App., *infra*, 7a, 11a). It has long been settled, however, that the construction placed upon a treaty by the Executive Branch is entitled to great deference by the courts. See, *e.g.*, *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180-185 (1982); *Factor* v. *Laubenheimer*, 290 U.S. 276, 294-295 (1933). It is likewise well established that treaties are to be construed liberally to effectuate the treaty partners' intentions. See, *e.g.*, *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 185; *Bacardi Corp. of America* v. *Domenech*, 311 U.S. 150, 161, 163 (1940). And domestic law should be interpreted, if possible, to avoid restricting the scope of a preexisting treaty provision. See *United States* v. *Lee Yen Tai*, 185 U.S. 213, 222 (1902); I.R.C. § 7852(d). The court of appeals' interpretation does not adhere to these principles. The court paid no deference to the Executive Branch's contrary interpretation, and the court read the treaty and Section 7602 narrowly to defeat the treaty's overrriding purposes.

The manifest purpose of the treaty provision involved here is to provide for the exchange of information between nations in order to assist the treaty partner's tax investigations. This cooperation is designed to serve the more general goal of "prevent[ing] fiscal evasion." *United States* v. *A.L. Burbank & Co.*, 525 F.2d 9, 13 (2d Cir. 1975), cert. denied, 426 U.S. 934 (1976). The summons at issue here undeniably was issued in furtherance of those goals at Canada's request. The court of appeals' action in this case

and its more general imposition of a new "foreign equivalent of referral" restriction on the use of treaty summonses can only serve to retard the accomplishment of these goals. This restriction is not compelled by the treaty language itself, and the court of appeals certainly cannot be regarded as having read that language liberally to advance the treaty's goals. As the Second Circuit suggested in *Manufacturers* (703 F.2d at 51), the treaty provision (Art. XXI) gives the partner the right to obtain "information the Commissioner is entitled to obtain under the revenue laws of the United States"; the fact that the IRS is "entitled to obtain" bank records for use in tax investigations is sufficient to justify enforcement of a treaty request like the one in this case. Indeed, even a narrow, literal reading of the treaty and the statute does not support the court of appeals' holding. Section 7602(c) prohibits the issuance of a summons only when there has been a referral to the U.S. Justice Department, which indisputably has not occurred here; the statute gives no hint that an inquiry should be made into whether a foreign investigation has reached a point analogous to a referral.

In sum, the court of appeals' holding casts a shadow over the Income Tax Convention with Canada and other similar treaties. It undermines the information exchange purpose of the treaty provision and may well impede the flow of reciprocal tax information and assistance necessary to our own internal tax investigations. More generally, the decision may weaken the position of the United States in dealing with its treaty partners and otherwise harm our international relations. As the Second Circuit noted in *Manufacturers* (703 F.2d at 53), "our international relations with Canada might be damaged and the executives in both countries might be embarrassed if an organ in this country were to characterize a Canadian request as made in 'bad faith' where the request was perfectly appropriate under the law of the requesting country."

The court of appeals seriously erred in interpreting the treaty and Section 7602 to yield these undesirable consequences in the absence of any relevant policy or other justification for its interpretation.

c. Apart from its erroneous holding that the equivalent of a Justice Department referral in the foreign tax investigation prevents a treaty summons from being enforced, the court of appeals also erred in placing upon the government the burden of showing the absence of such a referral equivalent. The court of appeals held that "the IRS must make an affirmative statement that the investigation has not reached a stage analogous to a Justice Department referral" (App., *infra*, 13a). This unprecedented conclusion appears to be based on the court's assumption that the IRS would be required in a domestic summons case to establish, as part of its prima facie case for enforcement, that a Justice Department referral is not in effect (see *ibid.*). This premise is erroneous.

To obtain enforcement of a domestic summons, the government bears the burden of showing that the requirements of *United States* v. *Powell*, *supra*, are met—essentially that the summons authority is being invoked in good faith for purposes authorized by the Code. This is ordinarily accomplished by means of an affidavit of the agent issuing the summons. See, *e.g.*, *United States* v. *Balanced Financial Mgmt., Inc.*, 769 F.2d 1440, 1443 (10th Cir. 1985). It has never been held, however, that the government must, in addition, show the absence of a criminal referral as part of its prima facie case.

In *LaSalle Nat'l Bank*, the Court affirmed the validity of a dual purpose summons—one seeking evidence for both criminal and civil investigation—but it held that a summons would not be enforceable if the IRS had abandoned its purpose of civil tax determination. The Court explicitly stated, however, that the person opposing enforcement bore the "heavy" burden "to disprove the actual existence of a valid civil tax determination or collection

purpose" (437 U.S. at 316). The lower courts accordingly recognized that the government established its prima facie case by the submission of an affidavit stating that the *Powell* factors were satisfied, and it was left to the person opposing enforcement to disprove the existence of a valid civil tax purpose at the "rebuttal stage" of the enforcement proceedings. See, *e.g.*, *United states* v. *Kis*, 658 F.2d 526, 530, 538-543 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 68 (3d Cir. 1979) (footnote omitted) ("once the Government has carried its *Powell* burden of proof of 'good faith,' the burden shifts to the taxpayer to show that the institutional 'good faith' required by *LaSalle* does not exist").

The enactment of TEFRA did nothing to change this procedural burden allocation. The legislative history specifically addressed the question of the burden of proof that would apply to the new statutory requirement that no criminal referral be in effect. The Senate Report explained (1 S. Rep. 97-494, *supra*, at 283 (emphasis added)):

> [T]he Secretary will have to meet all the requirements of *United States* v. *Powell*, 379 U.S. 48 (1964), including a showing that the individual investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that all the administrative steps required by the Code have been followed. As a *defense* to the enforcement of the summons, the taxpayer may show that the taxpayer's case has been referred to the Department of Justice.

Thus, it is apparent that Congress intended the referral restriction of Section 7602(c) to be a taxpayer defense rather than part of the prima facie showing to be made by the IRS.

This interpretation of the burden of proof with respect to the criminal referral restriction has been adopted by the Third Circuit in *Pickel* v. *United States*, 746 F.2d 176 (1984). The court there rejected the taxpayers' efforts to quash two IRS summonses where the agent's affidavit had not asserted that no Justice Department referral was in effect. The court stated that the taxpayers had not come forward with evidence to meet their burden, noting that "[t]he Pickels, as the parties opposing the summonses, bore the burden of showing * * * that a Justice Department referral had taken place" (*id.* at 184).[9] See also *United States* v. *Naden*, 57 A.F.T.R.2d (P-H) ¶ 86-632 (E.D. Cal 1986) (IRS "not required to make an affirmative showing of the absence of a Justice Department referral as part of * * * [its] prima facie case for enforcement"). These domestic summons cases are flatly inconsistent with the rationale of the decision below and with its premise that the government generally must show the absence of a referral as part of its prima facie case.

Moreover, fundamental principles of summons enforcement law strongly militate against the additional requirement imposed by the court below of demonstrating that the foreign proceedings have not reached a stage analogous to a Justice Department referral. Summons enforcement proceedings are intended to be summary in nature. See *Donaldson* v. *United States*, 400 U.S. 517 (1971). The court's role is limited to guarding against abuses of the summons power. See, *e.g.*, *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975); *United States* v. *Powell*, 379 U.S. at 57-58. Restrictions on that authority should not imposed " 'absent unambiguous directions from Congress.' " *United States* v. *Arthur Young & Co.*,

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[9] Of course, the government regularly furnishes the pertinent information to a taxpayer seeking, through informal inquiry or a discovery request, the evidence to discharge this burden. It remains, however, the taxpayer's burden to raise and establish such a defense in the domestic summons context.

465 U.S. 805, 816 (1984) (citation omitted). Here, however, the court has imposed an additional requirement on the IRS summons power—one that, contrary to the court's suggestion (App., *infra*, 13a), will impede the enforcement of tax treaty summonses. Each summons issued at the request of a treaty partner will require the U.S. "competent authority" to undertake an inquiry into the vagaries and detailed administration of various foreign legal systems, which may prove to be quite burdensome. This type of inquiry goes well beyond what has heretofore been viewed as necessary or appropriate for the enforcement of treaty summonses. See, *e.g.*, *United States* v. *Bache Halsey Stuart, Inc.*, 563 F. Supp. 898, 900-901 (S.D.N.Y. 1982).[10]

3. The issue presented here is one of great importance. The United States currently has in effect 31 tax treaties that include exchange of information provisions of the type contained in the Income Tax Convention with Canada. It also has several exchange of information executive agreements that are in effect with designated Carribean Basin countries. See I.R.C. § 274(h)(6)(C). These treaties and agreements are with the major trading and

[10] To the extent the decision below should be read as imposing in domestic summons cases as well the requirement that the affidavit assert the absence of a Justice Department referral, that requirement would also impede summons enforcement. It is true, as the court of appeals observed (App., *infra*, 13a), that government affidavits sometimes disclose referral status, but the government is under no legal obligation to do so. While it is ordinarily not difficult for the IRS to ascertain whether it has initiated a Justice Department referral (see I.R.C. § 7602(c)(2)(A)(i)), the statute also provides that a "Justice Department referral" is in effect when there has been a request by Justice for return information from the IRS pursuant to I.R.C. § 6103(h)(3)(B). See I.R.C. § 7602(c)(2)(A)(ii). It is quite difficult for the agent issuing the summons to determine whether there has been such a "reverse referral" in a given case.

economic partners of the United States and represent an important mechanism by which the United States and its treaty partners seek to prevent tax avoidance and evasion on an international level.

The IRS informs us that, during the period between January 1984 and July 1987, more than 1600 specific requests for information were made or received by the U.S. competent authority under the exchange of information provisions of our tax treaties. The success of the exchange of information program depends upon the cooperation of our treaty partners. Indeed, the United States depends to a a great extent on foreign nations' willingness to honor our requests for information, both in the tax area and in other enforcement areas. That cooperation might well be impaired, and the position of the United States in dealing with its treaty partners weakened, if the unnecessary obstacle to information exchange erected by the court of appeals in this case were allowed to stand. Moreover, if the conflict in the circuits on this issue were allowed to persist, identical treaty requests would meet with differing fates depending upon the circuit in which they arise, perhaps giving the appearance that the U.S. courts favor one country over another. Accordingly, the Court should act to resolve the conflict in the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4421
D.C. No. CV-84-511-C

PHILIP GEORGE STUART, SR., PETITIONER/APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT/APPELLEE

No. 86-3791
D.C. No. CV-84-512-M

MONS KAPOOR, PETITIONER/APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT/APPELLEE

Appeal from the United States District Court
for the Western District of Washington

Argued and Submitted
December 4, 1986—Seattle, Washington
Filed March 24, 1987

OPINION

Before: JAMES R. BROWNING, EUGENE A. WRIGHT, and
ROBERT BOOCHEVER, Circuit Judges.

Opinion by Judge BOOCHEVER; Dissent by Judge WRIGHT

BOOCHEVER, Circuit Judge:

Stuart and Kapoor, citizens and residents of Canada, appeal the district court's denial of their petitions to quash summonses of records held by their bank in Bellingham, Washington. The Internal Revenue Service issued the summonses at the request of the Canadian Department of National Revenue, pursuant to Articles XIX and XXI of the 1942 Income Tax Convention with Canada.

FACTS

Philip Stuart and Mons Kapoor (taxpayers) are citizens and residents of Canada. Both have accounts with the Northwestern Commercial Bank in Bellingham, Washington. In an attempt to determine their income tax liability for tax years 1980, 1981, and 1982, the Canadian Department of National Revenue (Revenue Canada or the department) seeks to examine all records in the bank's possession pertaining to accounts in taxpayers' names. Pursuant to Articles XIX and XXI of the Convention between the United States of America and Canada respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1399, T.S. No. 983 (as amended) (the treaty), Revenue Canada requested by letters dated January 3, 1984, that the Internal Revenue Service (IRS or the service) obtain these records through the issuance of summonses to the bank. Under the treaty, the competent authority for the country receiving the requests determines whether to honor them. Thomas J. Clancy, Director of Foreign Operations District, is the United States' competent authority. He stated in affidavits that the IRS had decided to honor these requests and to issue the summonses because: (1) the requested information may be relevant in determining the tax liability of Kapoor and Stuart; (2) the same type of information can be obtained

by Canadian tax authorities under Canadian law; and (3) the information requested was not already in the possession of the IRS. His affidavits also declared that Revenue Canada had requested the information to determine the correct tax liability of Stuart and Kapoor pursuant to a "criminal investigation, preliminary stage" and that he had determined Revenue Canada's requests were within the scope of the treaty. The service issued the summonses on April 2, 1984.

The IRS must give notice to any person whose records it seeks from a third party. I.R.C. § 7609(a)(1) (1982). When the taxpayers received notice of the summonses they directed the bank not to comply and petitioned the district court to quash the summonses pursuant to I.R.C. § 7609(b)(2). They claimed that the summonses were (1) not issued for lawful purposes, (2) did not seek information relevant to any inquiry concerning an internal revenue tax of the United States, and (3) that the information sought could be obtained directly by Revenue Canada under Canadian law. The taxpayers served interrogatories on the IRS requesting information regarding the purpose of Revenue Canada's investigation. The IRS refused to respond, claiming that discovery is not warranted where the taxpayers fail to demonstrate that triable issues exist.

A magistrate held a consolidated hearing on the petitions and recommended that the district court enforce the summonses. Over the taxpayers' objections to the magistrate's recommendations, the district court ordered the bank to comply with the summonses. This court granted a stay of enforcement pending appeal on July 14, 1986.

ANALYSIS

I. The Applicable Treaty

The taxpayers argue that the treaty of 1942 does not apply to these summonses. They point out that the Conven-

tion with Respect to Taxes on Income and on Capital, Sept. 26, 1980, United States-Canada, **reprinted in** 1 Tax Treaties (CCH) ¶ 1301 (1984) (1980 treaty), became effective on August 16, 1984, after the tax years in question and after the issuance of the summonses, but before the district court entered enforcement orders in either case. Article XXX of the 1980 treaty determines when its provisions enter into force:

> 2. The Convention shall enter into force upon the exchange of instruments of ratification and, subject to the provisions of paragraph 3, its provisions shall have effect:
>
> (a) For tax withheld at the source on income referred to in Articles X (Dividends), XI (Interest), XII (Royalties) and XVIII (Pensions and Annuities), with respect to amounts paid or credited on or after the first day of the second month next following the date on which the Convention enters into force;
>
> (b) For other taxes, with respect to taxable years beginning on or after the first day of January next following the date on which the Convention enters into force; and
>
> (c) Notwithstanding the provisions of subparagraph (b), for the taxes covered by paragraph 4 of Article XXIX (Miscellaneous Rules) with respect to all taxable years referred to in that paragraph.
>
> 3. . . . .
>
> 4. Subject to the provisions of paragraph 5, the 1942 Convention shall cease to have effect for taxes for which this Convention has effect in accordance with the provisions of paragraph 2.

The government offers two arguments for application of the 1942 treaty. First, it contends that because the summonses address tax liability for 1980-82, subsection 2(b)

controls when Article XXVII, the exchange of information provision, enters into force. This subsection states that, "for other taxes," the convention goes into effect on the first of January immediately following the exchange of the instruments of ratification. They were exchanged on August 16, 1984. Because Article XXVII is not explicitly mentioned in subsections 2(a) or 2(c), the government asserts that it falls into the category of "other taxes." Accordingly, the 1980 treaty only applies to summonses investigating tax liability for years commencing on or after January 1, 1985.

Alternatively, if the effective date of Article XXVII is determined by section 2 and not subsection 2(b) (i.e., if the 1980 treaty applies to any request for information made after August 16, 1984, regardless of the tax year to which the information pertains), the government notes that these requests were made on January 3, 1984, the summonses were issued on April 2, 1984, and the petitions to quash filed on April 20, 1984; all of these events preceded the exchange of instruments. The taxpayers argue that the determinative dates should be those on which the enforcement orders were issued, March 25, 1985, and December 11, 1985, respectively.

We review this question of treaty interpretation, one of first impression, de novo. We find the government's second argument persuasive and therefore need not address its first. The information exchange provisions of both treaties set out when the United States or Canada may honor the other's requests for information. The date of the request or, at the latest, the date of the decision to honor it should determine which treaty applies. Because these dates are prior to August 16, 1984, we look to the 1942 treaty in reviewing the district court's order granting enforcement of these summonses.

II. Political Question

The 1942 treaty has two articles dealing with information exchange, Article XIX and Article XXI, whose relevant parts follow:

Article XIX

> With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to **obtain under its revenue laws** in so far as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates.

Article XXI

> 1. If the Minister [of the Department of National Revenue] in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner [of the IRS], the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner **is entitled to obtain under the revenue laws of the United States of America.**

1942 Treaty, art. XIX, para. 1 and art. XXI para. 1 (emphasis added).

The government argues that the determination of the competent authority to honor a request conclusively establishes that Revenue Canada's request was made for a legitimate purpose under the treaty. Courts should not review this determination as it impinges on the executive

branch's conduct of foreign affairs. In essence, the government argues that the IRS's decision on whether to honor a request is a political question and therefore not justiciable. The application of the political question doctrine is a legal issue, which we review de novo.

In **Baker v. Carr,** 369 U.S. 186 (1982), the Supreme Court examined three factors to determine whether a question was political and therefore not justiciable: (1) does the text of the Constitution commit the issue "to a coordinate political department;" (2) does the judiciary lack "discoverable and manageable standards for resolving it;" and (3) would judicial intervention express a "lack of the respect due coordinate branches of government." **Id.** at 217. Here, the terms of the treaty permit the IRS to furnish Canada only with information that the service is entitled to obtain under the revenue laws of the United States. In other words, the United States may obtain information for Canada to the same extent that it could do so for its own use and subject to the same limitations. **See United States v. A.L. Burbank & Co.**, 525 F.2d 9, 13 (2d Cir. 1975), **cert. denied,** 426 U.S. 934 (1976). The question of what information can be obtained under the revenue laws of the United States is not one committed by the text of our Constitution to another branch, does not require courts to move beyond areas of judicial expertise, and does not appear to implicate substantial prudential considerations against judicial intervention.

The doctrine of judicial review commits the task of interpreting statutes primarily to the courts. Court have acquired from domestic cases substantial expertise in interpreting these revenue laws and, as more specifically pertains here, in reviewing requests for enforcement. Although one court has suggested that the international character of treaty requests counsels against judicial intervention. **United States v. Manufacturers & Traders**

Trust Co., 703 F.2d 47, 52-53 (2d Cir. 1983), our examination of the first two factors of the **Baker v. Carr** analysis convinces us that we should not apply the political question doctrine here. Moreover, this circuit has previously rejected the argument that the doctrine applies without exception to treaties simply because affairs of state are involved:

> It is the role of the judiciary to interpret international treaties and to enforce domestic rights arising from them. **See, e.g., Kolovrat v. Oregon,** 366 U.S. 187 (1961); **Perkins v. Elg,** 307 U.S. 325 (1939); **Charlton v. Kelly,** 229 U.S. 447 (1913); **United States v. Rauscher,** 119 U.S. 407 (1886). In those few cases involving interpretation of treaties when the political question doctrine precludes review, that doctrine has narrow confines. The principal area of non-justiciability concerns the right of the executive to abrogate a treaty. That is not the issue here.

United States v. Decker, 600 F.2d 733, 737 (9th Cir.)(some citations omitted), **cert. denied,** 444 U.S. 855 (1979).

Summonse in domestic cases are not self-enforcing. I.R.C. §§ 7402(b), 7604(a); **see United States v. Harris,** 628 F.2d 875, 879 (5th Cir. 1980). Our analysis of the political question doctrine does not convince us that we should treat summonses issued at the request of a treaty partner differently. "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." **United States v. Powell,** 379 U.S. 48, 58 (1964).

III. Good Faith

Courts will enforce a domestic summons only if it was issued in good faith. The four major elements of good faith were first set out in **Powell,** 379 U.S. at 57-58:

> [The Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose,

> that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . . .

The government argues that the good faith limitations placed on domestic summonses do not apply to summonses issued at the request of a treaty partner. We review this contention de novo. **Ponsford v. United States,** 771 F.2d 1305, 1307-08 (9th Cir. 1985); **see also United States v. McConney,** 728 F.2d 1195, 1202-04 (9th Cir.)(en banc), **cert. denied,** 469 U.S. 824 (1984). Even if these limitations apply in full force to treaty summonses, the government contends that the district court correctly concluded that the summonses were issued in good faith. We review the district court's finding of good faith under the clearly erroneous standard. **Ponsford,** 771 F.2d at 1307-08.

A. Application of Good Faith to Treaty Summonses

According to the taxpayers, the summonses were not issued in good faith because their purpose was improper; to aid Revenue Canada in its "criminal investigation, preliminary stage." The legitimate purpose element of good faith has changed since **Powell.** It originated in the Supreme Court's concern that the IRS might use its power to issue administrative summonses in order to harass taxpayers, to pressure them into settling collateral disputes, or, as Stuart and Kapoor assert is occurring in this instance, to obtain evidence for use in a criminal prosecution. **Powell,** 379 U.S. at 58; **Reisman v. Caplin,** 375 U.S. 440, 449 (1964). But as criminal and civil liability for violation of the tax laws are inherently intertwined, there has been some difficulty in deciding how far a criminal investigation can progress before the IRS must relinquish its power to issue summonses. **See Donaldson v. United States,** 400 U.S. 517, 531-36 (1971); **United States v.**

LaSalle Nat'l Bank, 437 U.S. 298, 306-21 (1978). A majority of five justices held in **LaSalle** that the IRS may issue summonses as long as it has not made a recommendation of criminal prosecution to the Department of Justice and has "not abandon[ed] in an institutional sense . . . the pursuit of civil tax determination or collection." **Id.** at 318. Justice Stewart, in a dissent joined by three other justices, predicted that determining "institutional good faith" would be unworkable and argued for a "bright-line test:" summonses in criminal investigations must be issued prior to a recommendation for criminal prosecution. **Id.** at 320-21.

Congress adopted the minority's view when it passed the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982. Pub. L. No. 97-248, 96 Stat. 324 (1982); **see** Joint Comm. on Taxation, **General Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982,** 97th Cong., 2d Sess. 234-36 (Comm. Print 1982); **see also** S. Rep. No. 494, 97th Cong., 2d Sess. 285-87 (1982), **reprinted in** 1982 U.S. Code Cong. & Admin. News 781, 1030-32. TEFRA allows the IRS to use its summonsing authority in investigations "into any offense connected with the administration or enforcement of the internal revenue laws" until the service refers the matter to the Justice Department. I.R.C. § 7602(b)-(c); **see Pickel v. United States,** 746 F.2d 176, 183-84 (3rd Cir. 1984).

The government argues that the good faith doctrine's requirement of a legitimate purpose should not apply to summonses issued at the request of a treaty partner. It urges this circuit to adopt the holding of **Manufacturers & Traders Trust Co.,** 703 F.2d at 49-53, a case involving the same treaty. The Second Circuit held that the legitimate purpose standard for summonses issued pursuant to treaty requests is less stringent than the standard developed in the decisions involving domestic cases. **Id.** It concluded that the phrase in Article XXI, "as the Commissioner is entitled

to obtain under the revenue laws of the United States of America" does not necessarily mean that the "judicial gloss" of the Supreme Court's decisions in **LaSalle** and **Powell** should apply to treaty summonses. After discussing the policy considerations upon which **LaSalle** rests, the Second Circuit held that "there is no purpose to applying" the limitations that prohibit the use of summonses to obtain information that will also be used for "criminal-investigatory-prosecutory purposes" or to obtain information that Revenue Canada will share with other officials concerned with criminal prosecution. **Id.** at 50-52. The court believed that the policies that led the Supreme Court to impose these limitations—concerns about infringing on the role of grand juries and about expanding discovery powers in criminal prosecutions—simply had no relevance to Canada, which does not employ grand juries and does not share "our position on pre-trial discovery in . . . criminal cases" or to Canadian citizens, who "ha[ve] no right to expect that [they] will have the protection accorded by this country to its own taxpayers and potential defendants." **Id.** at 52.

We decline the government's request to adopt **Manufacturers & Traders Trust Co.** That case involved a summons issued prior to Congress's imposition, via the TEFRA amendments, of the dissenters' position in **LaSalle.** Faced with the majority decision in **LaSalle,** the Second Circuit was understandably reluctant to delve into the institutional good faith of Revenue Canada, an agency of a foreign country. 703 F.2d at 52-53. After TEFRA, no such inquiry is necessary. Now the requirement is only that there had been no referral for criminal prosecution.

We hold that the good faith doctrine applies to summonses issued under the treaty. Accordingly, the next question we must address is whether the Canadian investigation has progressed to a stage analogous to a Justice

Department referral: (1) has Revenue Canada recommended that the Canadian Department of Justice criminally prosecute Kapoor and Stuart or (2) has Revenue Canada requested the summonses at the behest of the Canadian Department of Justice? See I.R.C. § 7602(c)(2)(A)(i)-(ii).

B. Prima Facie Showing of Good Faith

The affidavits of the IRS contain identical statements concerning the purposes of Revenue Canada's investigation:

> By letter Dated January 3, 1984, the Government of Canada, through Mr. Philip Pinkus, Director, Provincial and International Relations Division, Revenue Canada, made a request for information to be used to determine the correct tax liability of [the taxpayers], under the laws of Canada. The Canadian taxing authorities' investigation of [the taxpayers] is a criminal investigation, preliminary stage.

In its briefs and at oral argument, the government asserted that the burden is on the taxpayers to show that the criminal investigation in Canada has reached a stage analogous to a referral to the Department of Justice. They must do so without the benefit of discovery unless they can allege specific facts that raise a sufficient doubt concerning the department's purpose. **United States v. Samuels, Kramer & Co.**, 712 F.2d 1342, 1347-48 (9th Cir. 1983); **United States v. Church of Scientology**, 520 F.2d 818, 823-24 (9th Cir. 1975).

The government can establish its prima facie case for enforcement of a domestic summons with an affidavit from the agent who issued the summons stating that the requirements of good faith doctrine have been met: (1) the investigation is being conducted for a legitimate purpose;

(2) the inquiry is relevant to the purpose; (3) the information sought is not already within the service's possession; and (4) the required administrative steps have been followed. **Id.** at 821; **see also Powell**, 379 U.S. at 57-58; **Samuels, Kramer & Co.**, 712 F.2d at 1344-45. The government conceded at oral argument that its affidavits in domestic cases usually state that there has been no referral for prosecution, and affidavits quoted in reported decisions bear this out. **See, e.g. Moutevelis v. United States**, 727 F.2d 313, 314 (3d Cir. 1984). We hold that in order to establish its prima facie case by affidavit, the IRS must make an affirmative statement that the investigation has not reached a stage analogous to a Justice Department referral. The service is in the best position to determine this: it can consult with Canada's competent authority and can be expected to have greater familiarity with Canadian administrative procedures. We do not believe that requiring the IRS to make such a statement will unduly restrict the service's summonsing authority or impede enforcement of summonses. Moreover, this requirement avoids the anomaly of "placing a burden of proof upon the taxpayer and then denying access to what may be the very information needed to meet that burden." **United States v. Stuckey**, 646 F.2d 1369, 1373-74 (9th Cir. 1981), **cert. denied**, 455 U.S. 942 (1982).

Although we are convinced that disputes such as presented here are justiciable, we are also mindful of the importance of promptly disposing of challenges to summonses. **See United States v. Kis**, 658 F.2d 526. 533-36 (7th Cir. 1981), **cert. denied**, 455 U.S. 1018 (1982). Delay may defeat the purpose for which the summons is sought. By requiring the affidavit to contain information establishing that the summonses could be obtained under domestic law, the delay encountered in appeals such as this one would be avoided. Ambiguous statements about the purpose of an investigation invite challenges and lead to delay, as this case illustrates.

We conclude that it was clear error to find that the affidavits made a prima facie showing of legitimate purpose. The court on remand should allow the IRS the opportunity to amend its affidavits to include the required statement, **see United States v. Lincoln First Bank**, 45 A.F.T.R.2d (P-H) 80-942, 80-944 to 80-945 (S.D.N.Y. 1980)

C. Late Submission of Material by the IRS

One additional matter concerning the good faith showing requires discussion. After the case had been argued and submitted, the government sent additional materials to us. Included in this material were purported copies of portions of Revenue Canada's Operations Manual outlining the stages of criminal tax investigations. The government claims the excerpts indicate that the Revenue Canada had not yet recommended criminal prosecution and asks us to consider the excerpts under rule 44.1. Fed. R. Civ. P. 44.1. The taxpayers object to the government's submission.

Approximately one-half of the material the government submitted is additional briefing on domestic law. The government did not seek leave of the court before filing it and thereby violated subsections (c) and (j) of appellate rule 28. Fed. R. App. P. 28(c) & (j). We strike this portion and shall not consider it. We deal with the remaining material under rule 44.1, which states:

> **Determination of Foreign Law**
>
> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible

> under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Fed. R. Civ. P. 44.1. We note with concern that the government has made similar late submissions of foreign law materials in at least two other reported cases of this type. **See Harris v. United States**, 768 F.2d 1240, 1242 (11th Cir. 1985), **vacated**, 107 S.Ct. 450 (1986)(remanded for reconsideration in light of **O'Connor v. United States**, 107 S. Ct. 347 (1986)); **Coplin v. United States**, 761 F.2d 688, 691 (Fed. Cir. 1985), **aff'd sub nom. O'Connor v. United States**, 107 S. Ct. 347 (1986). We realize that we may consider foreign law materials at any time, whether or not submitted by a party, and that late submissions often have been considered in cases interpreting treaties. Fed. R. Civ. P. 44.1; **see Coplin**, 761 F.2d at 691-92. We decline to consider these. The purpose of rule 44.1's notice requirement is to avoid unfairly surprising opposing parties. Fed. R. Civ. P. 44.1 advisory committee's notes. Our task is certainly easier if a party who intends to raise an issue of foreign law does so as early as possible. Submission of such materials in the district court may well have the salutary effect of avoiding the delay encountered in appeals. Absent special circumstances, parties should present issues of foreign law in their appellate briefs at the latest. The excerpts submitted to us arrived without exact citations as to their source or their present validity. In fairness to the taxpayers and in order to encourage early submission of such material in the future, we decided the good faith issue on the briefs and oral argument. The government may submit the additional material upon remand, if necessary. At that time the taxpayers will have adequate opportunity to respond.

IV. Discovery

The taxpayers claim that the district court abused its discretion in denying their requests for discovery. If the IRS can establish a prima facie showing of legitimate purpose by amending its affidavits, submitting the excerpts from Revenue Canada's operating manual, or both, Stuart and Kapoor have the burden of overcoming that showing. They must make a substantial challenge alleging specific facts that raise "sufficient doubt" about the validity of the summonses. If they are unable to carry this burden, they are not entitled to discovery. **Samuels, Kramer & Co.**, 712 F.2d at 1347-48; **Church of Scientology**, 520 F.2d at 823-25.

V. Scope of Summons

The taxpayers challenge the summonses as overly broad. We review the district court's finding of relevancy for clear error and find none. The IRS has the authority to summon any records that may be "relevant" or "material" to a tax investigation. I.R.C. § 7602(a)(1). The service need show only that the materials "would throw light upon the correctness of the taxpayer's returns." **United States v. Ryan**, 455 F.2d 728, 733 (9th Cir. 1972). Relevancy, like legitimate purpose, is an element of good faith and therefore may be established by affidavit. **Liberty Fin. Servs. v. United States**, 778 F.2d 1390. 1392 (9th Cir. 1985). The taxpayers failed to allege specific facts and to produce some evidence establishing any doubt about the relevancy of the documents to which the summonses apply.

CONCLUSION

The orders of the district court enforcing the summonses are reversed and the petitions are remanded for proceedings consistent with his opinion.

REVERSED and REMANDED.

WRIGHT, Circuit Judge, dissenting:

I dissent because the majority opinion creates an unnecessary intercircuit split, imposes new burdens on the competent authority and meddles unnecessarily in Canadian internal affairs. Since I find that the competent authority has met its burden, I would enforce the summonses. "My belief is that a remand will only delay the conclusion of the case." Chambers, J., dissenting in *Neuschafer v. McKay*, 807 F.2d 839, 842 (9th Cir. 1987) (Chambers, J., dissenting).

In order to enforce a tax summons, the IRS need only make a showing of good faith. *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *see also Liberty Financial Services v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985) (burdens of establishing good faith is "minimal"). The courts look only to the competent authority's affidavit to determine whether "good faith" has been shown. *See United States v. Bache Halsey Stuart, Inc.*, 563 F. Supp. 898, 900-01 (S.D.N.Y. 1982); *Liberty*, 778 F.2d at 1392. No inquiry is made into the affidavit itself. *See id.*

Here, the competent authority's affidavit stated that (1) the Canadian request was within the scope of the treaty; (2) it was appropriate to honor the request; (3) the requested information may be relevant to the determination of current tax liabilities of Stuart and Kapoor under Canadian law; and (4) the same type of information could be obtained by Canadian authorities under Canadian law.

That affidavit shows good faith. It addresses the elements of *Powell*. In *Bache*, the competent authority submitted an affidavit almost identical to that here, and the court held that a prima facie showing was made. *Bache*, 563 F. Supp. at 900 n.2.

If the competent authority makes a showing, the taxpayers bear a heavy burden in refuting it. *United States v. LaSalle National Bank*, 437 U.S. 298, 317 (1978).

"Because criminal and civil fraud liabilities [in tax investigations] are coterminous, the Service *rarely* will be found to have acted in bad faith by pursuing the former." *Id.* (emphasis added).

Here, Stuart and Kapoor did not show an improper purpose. They made bare assertions that Canada's criminal investigation, preliminary stage, is analogous to a Justice Department referral, and that the competent authority lacked a proper purpose for his enforcement request.

This is hardly enough to carry a light burden, much less a heavy one. These Canadian taxpayers have failed to refute the competent authority's showing. *United States v. Samuels, Kramer & Co.*, 712 F.2d 1342, 1347 (9th Cir. 1983) (mere allegations are not enough to refute showing of good faith). The district court's finding was not clearly erroneous.[1]

The majority opinion holds that this affidavit fails to make a prima facie showing of good faith because its exact language differs from that used in *Powell* to describe the elements of good faith. *Powell*, 379 U.S. at 57-58. *Powell* does not require strict language. Rather, it requires merely a showing containing the elements of good faith. A court need not search the showing for specific words, but decides only whether a showing has been made.

The majority does not stop at requiring specific language in the affidavit. It goes on the create an additional requirement for the good faith showing. This would

[1] The clearly erroneous standard requires the appellate court to accept a lower court's finding of fact unless the appellate court is left with the "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Dollar Rent A Car of Washington, Inc. v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985). Even accepting the majority's interpretation of the good faith test, the difference between the language in the competent authority's affidavit and the language the majority demands is so minor that the district court's ruling can not be deemed clearly erroneous.

require that the competent authority must, in addition to the *Powell* language, "make an affirmative statement that the investigation has not reached a stage analogous to a Justice Department referral." Op. at 14-15. The majority justifies this by implying that the statement is required by the revenue laws of the United States, and thus by the treaty. Op. at 7, 13. It also says that (1) the IRS is better able to make this determination; (2) this will not impede enforcement of the summons; and (3) this will reduce litigation and delay in enforcement. *Id.* at 15.

Only one circuit has considered the good faith requirement in a request for summons under this treaty. The Second Circuit held in *United States v. Manufacturers & Traders Trust Co.*, 703 F.2d 47 (2d Cir. 1983), that "the requirements for summons-enforcement are not in all respects precisely the same as for domestic cases." *Manufacturers*, 703 F.2d at 50.

The majority opinion rejects the holding of *Manufacturers* and creates an intercircuit conflict. The reasoning appears to be that (1) the Tax Equity and Fiscal Responsibility Act of 1982 modified the good faith test requirement and (2) "revenue laws of the United States" should include statutes *and* Supreme Court decisions.

These are not sound bases to reject the holding of *Manufacturers*. That case is not undercut by the fact that the Act (TEFRA) eliminated the requirement that one requesting information from the IRS not abandon the civil investigation intent. The majority opinion observes that the Second Circuit was "reluctant to delve into the institutional good faith of Canada." Op. at 12. That court's approach was consistent with current law.

Manufacturers does not say that Supreme Court opinions are not part of the "revenue laws of the United States," and neither does it say that *Powell* and *LaSalle* do not apply. Op. at 12-13. It does say that "the judicial gloss need not be the same for an international case of this type

as for a wholly domestic one." *Manufacturers*, 703 F.2d at 51. It holds that, because this country's policies of (1) pursuing criminal prosecutions through the Justice Department, rather than the IRS and (2) limiting criminal prosecution discovery, do not apply in Canada, we should relax the good faith test for Canadian tax information requests. *Id.* at 52.

The Second Circuit opinion shows a healthy respect for the United States' responsibilities under an international treaty. The court recognized "considerations special to dealings between separate nations" and noted that

> Canada might wonder what concern the United States has in applying its internal policy to a case in which this country's taxes and citizens are not at all involved—only Canada's. More than that, our international relations with Canada might be damaged and the executives in both countries might be embarrassed in an organ in this country were to characterize a Canadian request as made in "bad faith" where that request was perfectly appropriate under the law of the requesting country.

Manufacturers, 703 F.2d at 53.

I also disagree with the majority's other justification. This new requirement will necessarily impede the enforcement of a summons because it requires the competent authority to make additional findings. It will *increase* rather than decrease enforcement litigation because the courts will have to determine ultimately exactly what kinds of Canadian investigations are "analogous" to a Justice Department referral.

The good faith issue should have been decided without a remand. In the course of oral argument, it appeared there was some confusion over the government's burden to make an adequate showing to justify a warrant. To assist the court, government counsel tendered supplemental materials but without complying with procedural rules, as

noted by the majority. But there is precedent for doing just what counsel has done here in cases involving the interpretation of treaties. *Coplin v. United States*, 761 F.2d 688, 691 (Fed. Cir. 1985), *aff'd sub nom. O'Connor v. United States*, 107 S. Ct. 347 (1986).

The taxpayers objected to our considering the materials, not because they were irrelevant or inaccurate statements of Canadian procedures but only because the rule had not been followed. The simple and expedient way to handle this would have been to invite the taxpayers to respond, giving a reasonable time. Had we done so, this case would long since have been decided.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4421
CV-84-511-C

PHILIP GEORGE STUART, SR., PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

No. 86-3791
CV-84-512-M

MONS KAPOOR, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

APPEAL from the United States District Court for the District of WESTERN WASHINGTON (SEATTLE).

[Filed Sept. 11, 1987]

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of WESTERN WASHINGTON (SEATTLE) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of

the said District Court in this Cause be, and hereby is REVERSED AND REMANDED.

A TRUE COPY
ATTEST SEP. 8, 1987
CATHY A. CATTERSON

Clerk of Court

by: /s/ Don McFarland
DON FARLAND MC
Deputy Clerk

This certification constitutes the mandate of the Court.

Filed and entered 3-24-87

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4421

PHILIP GEORGE STUART, SR., PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

No. 86-3791

MONS KAPOOR, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed Aug 27, 1987]

ORDER

Before: BROWNING, Chief Judge, WRIGHT and BOOCHEVER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the active judges in favor of en banc consideration. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil No. C84-511C

PHILIP GEORGE STUART, SR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

[Filed Dec. 11, 1987]

FINAL JUDGMENT AND ENFORCEMENT ORDER

This Court having considered the Petition to Quash Summons, the verified Response to that petition, the positions and arguments of the parties, the Report and Recommendation of United States Magistrate John L. Weinberg and the Court finding that: (1) the summons was issued for a legitimate purpose; (2) the summoned data may be relevant to that purpose; (3) the summoned data are not already in the Internal Revenue Service's possession; and (4) the administrative steps required by the Internal Revenue Code have been followed, it is now therefore

ORDERED that the Petition to Quash Summons is denied; it is further

ORDERED that Northwest Commercial Bank shall comply with and obey the summons served upon it, by appearing at the offices of the Internal Revenue Service, 104 West Magnolia, Bellingham, Washington, before Special Agent Deborah Gavin or her designee at a time to be agreed upon by the parties but not later than twenty days

after entry of this Order, then and there to testify and to produce for inspection and copying all of the books, papers, records and other data described in the summons served upon it, such appearance, testimony, inspection and copying to continue from day to day until complete.

Done this 11th day of December, 1985.

/s/ John C. Coughenour
JOHN C. COUGHENOUR
United States District Judge

Presented by:

/s/ F. Michael Kovach Jr.
F. MICHAEL KOVACH, JR.
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6605

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil No. C84-511C

PHILIP GEORGE STUART, SR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

[Received Oct. 2, 1985]

REPORT AND RECOMMENDATION FOR ENFORCEMENT OF I.R.S. SUMMONS

INTRODUCTION AND PROCEDURAL BACKGROUND

Petitioner is a citizen and resident of Canada. The Canadian government is attempting to determine his income tax liabilities, under Canadian law, for the years 1980, 1981 and 1982. The investigation is a "criminal tax investigation, preliminary stage."

The United States and Canada are signatories to the Income Tax Convention with Canada, March 4, 1942 (56 Stat. 1399) ("the Convention"). Under its terms, one country may request the other to obtain, and provide to the other, information useful to the requesting country in assessing income taxes.

In this case, Canada requested the United States to provide information relating to petitioner's liability for Cana-

dian income tax. The request letter itself is not part of the record in this court, as it is kept secret pursuant to the agreement of the two countries. Thomas J. Clancy, the responsible official with the Internal Revenue Service, describes the letter in his affidavit.

Pursuant to the request, I.R.S. Special Agent Deborah Gavin issued a summons to the Northwestern Commercial Bank in Bellingham, Washington. The summons requested all records pertaining to accounts in petitioner's name during the three years in question, including but not limited to transactions involving loans, bonds, stocks and/or other investment transactions. Petitioner received notice of the summons,[1] directed the bank not to comply, and petitioned this court, pursuant to 26 U.S.C. § 7609, to quash the summons. The United States moves for summary enforcement. The parties have submitted pleadings, and presented oral argument.

Petitioner has also submitted a set of interrogatories. The United States has declined to answer them, asserting that discovery is not appropriate in an I.R.S. summons case where there are no relevant factual issues. While there is no formal motion to compel, petitioner requests an order directing the United States to respond to the interrogatories.

ISSUES

The parties present four issues relating to the enforceabilty of the summons:

(1) Can an I.R.S. summons be used where the tax liability is for Canadian taxes, not United States taxes?

[1] In this court, petitioner initially claimed he did not receive timely notice of the summons. He later withdrew that contention.

(2) Does the criminal nature of the Canadian investigation render the summons improper under United States laws?

(3) What is the impact of Canadian law upon the enforceability of the summons?

(4) Has the United States made a sufficient showing that the documents covered by the summons are relevant to petitioner's Canadian tax liability?

DISCUSSION

Powell Requirements for Summonses Under the Convention. The Convention provides that the country receiving the request furnishes information which its competent authorities

> "have at their disposal or are in a position to obtain under its revenue laws . . . ." Article XIX.

Upon proper request from Canada, the United States Commissioner of Internal Revenue may furnish

> ". . . such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America." Article XXI.

Thus, the enforceability of an I.R.S. summons issued pursuant to a request under the Convention is to be determined under the same standards as other I.R.S. summonses. Those standards are set forth in *United States v. Powell*, 379 U.S. 48, 57-58 (1964). An I.R.S. summons must: (1) be issued for a proper purpose; (2) seek information relevant to that purpose; (3) seek information not currently in the government's possession; and (4) satisfy all of the administrative steps regarding the service and issuance of the summons.

Canadian Tax Liability. Petitioner asserts this summons was not issued for a proper purpose because there is no allegation petitioner has any liability for United States

taxes. This contention has no merit, for the reasons discussed by the Second Circuit in *U. S. v. A. L. Burbank & Co., Ltd.*, 525 F.2d 9, at 12-14 (2d Cir. 1975). The purpose of these portions of the Convention is to permit the I.R.S., in assisting Canada to assess and enforce Canadian taxes, to utilize procedural techniques which are available for assessing United States tax liabilities.

Criminal Investigation. The I.R.S. may not issue a summons where a "Justice Department referral is in effect" with respect to a United States taxpayer. 26 U.S.C. §7602(c) (as amended in 1982). Petitioner contends that, because the Canadian authorities are conducting a "criminal investigation, preliminary stage," United States law prohibits the use of a summons in his case.

In *U. S. v. Manufacturers and Traders Trust Co.*, 703 F.2d 47 (2d Cir. 1983), the Court held that summonses can be issued by the I.R.S. under the Convention in cases involving Canadian criminal investigations, even if such a summons would not be proper in connection with a similar United States criminal investigation. The Court reasoned that I.R.S. summonses cannot be used in domestic criminal cases because such case would evade limitations under United States law on discovery in criminal cases, and usurp the function of the grand jury. The Court found these considerations of domestic law did not support similar limitations where the criminal investigation was in Canada. Under the Second Circuit's rationale, therefore, even if the Canadian authorities have invoked a procedure analogous to a Justice Department referral, the I.R.S. can nevertheless issue a summons upon request under the Convention.

In this case, however, it is not necessary to reach that issue. The only evidence in the record as to the nature and status of the Canadian investigation is that the Canadian authorities,

> ". . . made a request for information to be used to determine the correct tax liability of [petitioner], under the laws of Canada. The Canadian taxing authorities' investigation of [petitioner] is a criminal investigation, preliminary stage."

Affidavit of Thomas J. Clancy, p. 2. See also, declaration of Deborah Gavin, p. 2.

Petitioner has not established that there have been any steps taken in the Canadian criminal investigation which would be analogous to a Justice Department referral. Nor would petitioner's proposed interrogatories elicit that information. Even if this Court were to reach a conclusion different from that of the Second Circuit in *Manufacturers and Traders Trust*, petitioner would have the burden of showing that the Canadian authorities have invoked a procedure analogous to a Justice Department referral. Because he has not so shown, his contention in this respect must fail.

Canadian Law. Petitioner next contends that the summons should not be enforced because obtaining access to records in this manner would violate Canadian law relating to search warrants. This contention is without merit for at least three independent reasons.

First, the Convention contemplates that the law of the country *receiving* the request will govern in determining what information is or is not available. Canada makes the request; the I.R.S. then furnishes such relevant information as it, ". . . is entitled to obtain under the revenue laws of the United States of America . . Article XXI.

Second, even if issues of Canadian law are relevant, the courts of that country are a far preferable forum for determining whether the procedures invoked here constitute a violation of Canadian law. If petitioner persuades the courts of Canada that there were such violations in obtaining information pursuant to this summons, those courts can afford appropriate relief.

Finally, even if the issues of Canadian law were properly before this court, petitioner has not made a persuasive showing of any violation. He contends the Canadian authorities were required to obtain a search warrant for the records in question. He does not explain, however, how a Canadian judge could issue a search warrant for a bank in Bellingham, Washington. Furthermore, the United States has persuasively argued that the I.R.S. summons is at least as analogous to an "investigation," under §231(1) of the Income Tax Act of Canada, as it is to a "search," under §231(4). No search warrant is required to enter premises to examine books, records and accounts pursuant to an "investigation."

Relevance of Documents. Petitioner contends there has not been a sufficient showing that the documents covered by the summons are relevant to his Canadian tax liability for 1980 through 1982. For obvious reasons, the I.R.S. is not required to demonstrate prospectively the precise relevance of documents which they are seeking to obtain. Bank account records, including transactions dealing with loans, stocks, bonds and other investments, are reasonably calculated to be relevant to income tax liability for the corresponding years. Petitioner's contention in this respect is not persuasive.

CONCLUSION

For the foregoing reasons, petitioner's challenges to the enforceability of the summons are without merit. The court should find that:

(1) The requirements of the Convention and of *U. S. v. Powell, supra*, have been satisfied;

(2) There are no relevant factual issues, and the court should therefore decline to require the United States to respond to petitioner's interrogatories;

(3) The petition to quash the summons should be denied; and

(4) The Motion for Summary Enforcement should be granted.

A proposed order accompanies this Report and Recommendation.

The court should note that there are two cases pending which are assigned to different District Judges, and which appear to be identical as to all facts and issues except the identity of the Canadian resident who is the petitioner. The cases are *Philip George Stuart v. United States*, C84-511C and *Mon Kapoor v. United States*, C84-512M. The counsel are the same in both cases, and have identified no relevant differences between the cases. The same Report and Recommendation and proposed order is being filed in each case.

DATED this 30th day of September, 1985.

/s/ John L. Weinberg
JOHN L. WEINBERG
United States Magistrate

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil No. C84-512M

MONS KAPOOR, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

[Filed Nov. 29, 1985]

FINAL JUDGMENT AND ENFORCEMENT ORDER

This Court having considered the Petition to Quash Summons, the verified Response to that petitioner, the positions and arguments of the parties, the Report and Recommendation of United States Magistrate John L. Weinberg and the Court finding that: (1) the summons was issued for a legitimate purpose; (2) the summoned data may be relevant to that purpose; (3) the summoned data are not already in the Internal Revenue Service's possession; and (4) the administrative steps required by the Internal Revenue Code have been followed, it is now therefore

ORDERED that the Petition to Quash Summons is denied; it is further

ORDERED that Northwest Commercial Bank shall comply with and obey the summons served upon it, by appearing at the offices of the Internal Revenue Service,

104 West Magnolia, Bellingham, Washington, before Special Agent Deborah Gavin or her designee at a time to be agreed upon by the parties but not later than twenty days after entry of this Order, then and there to testify and to produce for inspection and copying all of the books, papers, records and other data described in the summons served upon it, such appearance, testimony, inspection and copying to continue from day to day until complete.

Done this 25th day of March, 1985.

/s/ Walter T. McGovern
WALTER T. MCGOVERN
United States District Judge

Presented by:

/s/ F. Michael Kovach, Jr.
F. MICHAEL KOVACH, JR.
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6605

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil No. C84-512M

MONS KAPOOR, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

[Filed Oct. 1, 1985]

REPORT AND RECOMMENDATION FOR ENFORCEMENT OF I.R.S. SUMMONS

INTRODUCTION AND PROCEDURAL BACKGROUND

Petitioner is a citizen and resident of Canada. The Canadian government is attempting to determine his income tax liabilities, under Canadian law, for the years 1980, 1981 and 1982. The investigation is a "criminal tax investigation, preliminary stage."

The United States and Canada are signatories to the Income Tax Convention with Canada, March 4, 1942 (56 Stat. 1399) ("the Convention"). Under its terms, one country may request the other to obtain, and provide to the other, information useful to the requesting country in assessing income taxes.

In this case, Canada requested the United States to provide information relating to petitioner's liability for Canadian income tax. The request letter itself is not part of the record in this court, as it is kept secret pursuant to the agreement of the two countries. Thomas J. Clancy, the responsible official with the Internal Revenue Service, describes the letter in his affidavit.

Pursuant to the request, I.R.S. Special Agent Deborah Gavin issued a summons to the Northwestern Commercial Bank in Bellingham, Washington. The summons requested all records pertaining to accounts in petitioner's name during the three years in question, including but not limited to transactions involving loans, bonds, stocks and/or other investment transactions. Petitioner received notice of the summons,[1] directed the bank not to comply, and petitioned this court, pursuant to 26 U.S.C. § 7609, to quash the summons. The United States moves for summary enforcement. The parties have submitted pleadings, and presented oral argument.

Petitioner has also submitted a set of interrogatories. The United States has declined to answer them, asserting that discovery is not appropriate in an I.R.S. summons case where there are no relevant factual issues. While there is no formal motion to compel, petitioner requests an order directing the United States to respond to the interrogatories.

ISSUES

The parties present four issues relating to the enforceability of the summons:

(1) Can an I.R.S. summons be used where the tax liability is for Canadian taxes, not United States taxes?

---

[1] In this court, petitioner initially claimed he did not receive timely notice of the summons. He later withdrew that contention.

(2) Does the criminal nature of the Canadian investigation render the summons improper under United States laws?
(3) What is the impact of Canadian law upon the enforceability of the summons?
(4) Has the United States made a sufficient showing that the documents covered by the summons are relevant to petitioner's Canadian tax liability?

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Powell Requirements for Summonses Under the Convention. The Convention provides that the country receiving the request furnishes information which its competent authorities

> "have at their disposal or are in a position to obtain under its revenue laws . . . ." Article XIX.

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taxes. This contention has no merit, for the reasons discussed by the Second Circuit in *U. S. v. A. L. Burbank & Co., Ltd.*, 525 F.2d 9, at 12-14 (2d Cir. 1975). The purpose of these portions of the Convention is to permit the I.R.S., in assisting Canada to assess and enforce Canadian taxes, to utilize procedural techniques which are available for assessing United States tax liabilities.

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> " . . . made a request for information to be used to determine the correct tax liability of [petitioner], under the laws of Canada. The Canadian taxing authorities' investigation of [petitioner] is a criminal investigation, preliminary stage."

Affidavit of Thomas J. Clancy, p. 2. See also, declaration of Deborah Gavin, p. 2.

Petitioner has not established that there have been any steps taken in the Canadian criminal investigation which would be analogous to a Justice Department referral. Nor would petitioner's proposed interrogatories elicit that information. Even if this Court were to reach a conclusion different from that of the Second Circuit in *Manufacturers and Traders Trust*, petitioner would have the burden of showing that the Canadian authorities have invoked a procedure analogous to a Justice Department referral. Because he has not so shown, his contention in this respect must fail.

Canadian Law. Petitioner next contends that the summons should not be enforced because obtaining access to records in this manner would violate Canadian law relating to search warrants. This contention is without merit for at least three independent reasons.

First, the Convention contemplates that the law of the country *receiving* the request will govern in determining what information is or is not available. Canada makes the request; the I.R.S. then furnishes such relevant information as it, ". . . is entitled to obtain under the revenue laws of the United States of America . . Article XXI.

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Finally, even if the issues of Canadian law were properly before this court, petitioner has not made a persuasive showing of any violation. He contends the Canadian authorities were required to obtain a search warrant for the records in question. He does not explain, however, how a Canadian judge could issue a search warrant for a bank in Bellingham, Washington. Furthermore, the United States has persuasively argued that the I.R.S. summons is at least as analogous to an "investigation," under §231(1) of the Income Tax Act of Canada, as it is to a "search," under §231(4). No search warrant is required to enter premises to examine books, records and accounts pursuant to an "investigation."

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CONCLUSION

For the foregoing reasons, petitioner's challenges to the enforceability of the summons are without merit. The court should find that:

> (1) The requirements of the Convention and of *U. S. v. Powell, supra*, have been satisfied;
>
> (2) There are no relevant factual issues, and the court should therefore decline to require the United States to respond to petitioner's interrogatories;
>
> (3) The petition to quash the summons should be denied; and

(4) The Motion for Summary Enforcement should be granted.

A proposed order accompanies this Report and Recommendation.

The court should note that there are two cases pending which are assigned to different District Judges, and which appear to be identical as to all facts and issues except the identity of the Canadian resident who is the petitioner. The cases are *Philip George Stuart v. United States*, C84-511C and *Mon Kapoor v. United States*, C84-512M. The counsel are the same in both cases, and have identified no relevant differences between the cases. The same Report and Recommendation and proposed order is being filed in each case.

DATED this 30th day of September, 1985.

/s/ John L. Weinberg
JOHN L. WEINBERG
United States Magistrate

APPENDIX H

The Convention Respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1405-1406, provides in pertinent part:

Article XIX

With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws in so far as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relate.

The information to be furnished under the first paragraph of this Article, whether in the ordinary course or on request, may be exchanged directly between the competent authorities of the two contracting States.

* * * * *

Article XXI

1. If the Minister in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner, the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America.

2. If the Commissioner in the determination of the income tax liability of any person under

any of the revenue laws of the United States of America deems it necessary to secure the cooperation of the Minister, the Minister may, upon request, furnish the Commissioner such information bearing upon the matter as the Minister is entitled to obtain under the revenue laws of Canada.

Section 7602 of the Internal Revenue Code (26 U.S.C.) provides:

Examination of books and witnesses

(a) Authority to summon, etc.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized –

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to given such testimony,

under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense

The purposes for which the Secretary may take any action described in paragaraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) No administrative summons when there is Justice Department referral

(1) Limitation of authority

No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect

For purposes of this subsection –

(A) In general

A Justice Department referral is in effect with respect to any person if –

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination

A Justice Department referral shall cease to be in effect with respect to a person when—

(i) the Attorney General notifies the Secretary, in writing, that—

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately

For purpose of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

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Supreme Court, U.S.
FILED
APR 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1064

In The
Supreme Court of the United States
October Term, 1987

UNITED STATES OF AMERICA,
Petitioner,

v.

PHILIP GEORGE STUART, SR.,
AND MONS KAPOOR,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In The
Supreme Court of the United States
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—o—

UNITED STATES OF AMERICA,
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PHILIP GEORGE STUART, SR.,
AND MONS KAPOOR,
Respondents.

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

Respondents Philip George Stuart, Sr. and Mons Kapoor by and through their counsel of record hereby present this Brief in Opposition to the Petition of the United States of America for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

I. STATEMENT OF THE CASE

Messrs. Philip George Stuart, Sr. and Mons Kapoor are Canadian citizens and taxpayers, residing in the Province of British Columbia. They received notice that the Internal Revenue Service ("IRS") had issued and served summonses on the Northwestern Commercial Bank in Bellingham, Washington, at the request of the Department of National Revenue, Canada ("Revenue Canada") seeking production of records regarding their financial transactions.[1] Stuart and Kapoor commenced proceedings under 26 U.S.C. § 7609(b)(2) to quash the summonses. The Northwestern Commercial Bank was notified of the pendency of those proceedings and instructed, pursuant to 26 U.S.C. § 7609(d), not to produce any records unless a court order directing it to do so was obtained.

The petitions to quash challenged the enforcement of the summonses on the grounds that they were not issued for a lawful purpose, did not seek information relevant to any inquiry concerning an internal revenue tax of the United States, and that the information could be requested directly under applicable Canadian statutes and regulations.[2] The petitions also alleged that since the summonses were not issued for a lawful purpose, the IRS had therefore failed to follow the required administrative procedures. *United States v. Powell*, 379 U.S. 48, 57-59 (1964). The IRS' responses to the petitions to quash confirmed that the IRS was not claiming or investigating any United States tax liability on the part of either man.

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1 Stuart and Kapoor also received notice that the IRS had issued summonses to another third-party recordkeeper located in the Western District of Washington. Petitions challenging those summonses were filed. The petitions were dismissed as moot after the IRS withdrew those summonses.

2 Stuart's petition also alleged, on the basis of information and belief, that the IRS had failed to give him proper notice under 26 U.S.C. § 7609(a)(1) and that the summons was therefore unenforceable. Subsequently, Stuart learned that notice had been properly given and this objection was withdrawn during oral argument on the IRS' motion for summary enforcement of the summonses.

After receiving the IRS' responses to their petitions to quash, Stuart and Kapoor each served on the IRS a set of interrogatories consisting of six questions seeking limited but highly relevant discovery concerning the criminal nature of Revenue Canada's investigation. The IRS refused to provide any discovery responses whatsoever stating that the letter request for an exchange of information from Revenue Canada was considered "secret" and that the IRS does not allow its own counsel, much less a party challenging a summons, access to such information.

At the same time it filed its objections to providing any discovery, the IRS filed motions for summary enforcement of the summonses. The Affidavits of Thomas J. Clancey, Director of the IRS Foreign Operations District, disclosed that "[t]he Canadian taxing authorities' investigation of [the petitioner] is a criminal investigation, preliminary stage." This disclosure of the criminal nature of Revenue Canada's investigation made the need for the discovery sought by Stuart and Kapoor even more acute. Stuart and Kapoor opposed the motions for summary enforcement.

As both proceedings had previously been referred to Magistrate John L. Weinberg pursuant to 28 U.S.C. § 636 (b)(1) and Magistrate's Rule 4(a)(6), Local Rules of the Western District of Washington, Magistrate Weinberg

heard oral argument on both summary enforcement motions at a single hearing on July 27, 1984. No evidentiary hearing was held at that time or later, the motions being determined only on the basis of the pleadings and records on file.

On September 30, 1985, the Report and Recommendation of Magistrate Weinberg was filed in the Stuart proceeding. The same Report and Recommendation was filed the next day in the Kapoor proceeding. Stuart and Kapoor filed objections to the reports pursuant to Magistrate's Rule 4(c), Local Rules of the Western District of Washington. In addition to renewing the objections made in their memoranda opposing the motions for summary judgment, Stuart and Kapoor raised the issue of whether the Convention Respecting Double Taxation, March 4, 1942, United States-Canada, 56 Stat. 1399, T.S. No. 983 (as amended) ("1942 Treaty") or the Convention with Respect to Taxes on Income and on Capital, September 26, 1980, United States-Canada, *reprinted in* 1 Tax Treaties (CCH) ¶ 1301 (1984), controlled enforcement of the summonses. Stuart's and Kapoor's objections to the Magistrate's Report also requested an opportunity to pursue discovery regarding the equivalency of Revenue Canada's "criminal investigation, preliminary stage" to a referral to the United States Department of Justice.

The two United States District Court judges to whom the petitions had been originally assigned each adopted the Magistrate's Report and Recommendation without modification. Notices of appeal from the final judgments enforcing the summonses were timely filed in each case. The United States Court of Appeals for the Ninth Circuit con-

solidated the two appeals and, on the motion of respondent, stayed enforcement of the summonses pending the outcome of the appeals. The appeals were argued and submitted on December 4, 1986 and the court's opinion was filed on March 24, 1987. The United States petitioned the court for a rehearing with a suggestion for a rehearing en banc. That petition was denied.

Following denial of its petition for rehearing, the United States sought and was granted an extension to file its petition for a writ of certiorari. After reviewing the petition for certiorari, Stuart and Kapoor, through their counsel, informed the clerk of this court that while they opposed the granting of the petition for a writ of certiorari, they expressly waived their right to file a brief opposing the petition. The clerk later relayed the court's interest in receiving from respondents a brief opposing the petition for a writ of certiorari. Respondents sought and were granted an extension of time within which to file this brief.

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II. SUMMARY OF ARGUMENT

The issuance of a writ of certiorari to review a decision of a federal court of appeals is justified only when there are special and important reasons for doing so. The issues raised in the decision for which the United States seeks review are not of sufficient importance to justify discretionary review by writ of certiorari. Moreover, the apparent conflict between *Stuart v. United States of America*, 813 F.2d 243 (9th Cir. 1987) and *United States*

of America v. Manufacturers and Traders Trust Co., 703 F.2d 47 (2d Cir. 1983), is not a "real and embarrassing" conflict that requires this court's intervention to resolve. The factual and legal contexts in which those two cases were decided were sufficiently different to explain the dissimilar outcomes.

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III. REASONS FOR DENYING THE PETITION

1. There Are No Special and Important Reasons for Issuing a Writ of Certiorari

This court need hardly be reminded that its limited resources must be spent carefully in granting discretionary review of decisions of federal courts of appeal. Rule 17.1 of the Rules of the United States Supreme Court sets forth a principle long embodied in the jurisprudence of this court: that there must be "special and important reasons" to justify issuance of a writ of certiorari. *Layne & Bowler Corp. v. Western Wells Works, Inc.*, 261 U.S. 387 (1923). Discretionary review by writ of certiorari should only be granted in cases of true importance to the public and in cases where there is a "real and embarrassing" conflict between circuit courts of appeal. *Id.* 261 U.S. at 393; *accord Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). One of the arguments made in the petition for a writ of certiorari in support of the claim that special and important reasons for granting the writ exist is simply that the *Stuart* decision incorrectly interprets a treaty. If an allegedly erroneous decision of a circuit court of appeal were sufficient ground for the issu-

ance of a writ of certiorari, this court would likely be overwhelmed with discretionary review cases.

That argument can be disposed of by exploring the sound basis of the *Stuart* majority's interpretation of the request for exchange of information provisions of the 1942 Treaty. The information exchange provisions of the 1942 Treaty describe the information that the receiving state is authorized to provide to the requesting state as information that it is "in a position to obtain under its revenue laws" (Article XIX, par. 1) or "is entitled to obtain under the revenue laws of the United States of America" (Article XXI, par. 1).

The interpretation of a treaty must begin with its language. The clear import of the treaty language controls unless such application will cause a result that is clearly at odds with the intention of the parties to the treaty. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (citing *Maximov v. United States*, 373 U.S. 49, 54 (1963)). The clear import of Articles XIX and XXI of the 1942 Treaty is that the Revenue Canada is not entitled to obtain and the Internal Revenue Service cannot expect to obtain or provide information in a fashion inconsistent with United States summons enforcement law. *See U.S. v. A.L. Burbank & Co., Ltd.*, 525 F.2d 9, 13 (2d Cir. 1975), *cert. denied* 426 U.S. 934 (1976).

Prior to passage of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Public Law No. 97-248, 96 Stat. 324 (1982), an "institutional bad faith" defense to summons enforcement had been recognized by the courts and had been the source of considerable litigation. *See United States v. LaSalle Nat'l Bank*, 437 U.S.

298 (1978)[3]; *Donaldson v. United States,* 400 U.S. 517 (1971). In an effort to streamline summons enforcement proceedings, the courts had also severely restricted a taxpayer's right to discovery of facts necessary to challenge the government's *prima facie* case. *See United States v. Church of Scientology,* 520 F.2d 818 (9th Cir. 1975); *United States v. Samuels, Kramer & Co.,* 712 F.2d 1342 (9th Cir. 1983). The *Stuart* majority opinion affirms the application of this aspect of "judicial gloss" to foreign tax convention summons enforcement.[4]

Stuart and Kapoor found themselves in a particularly unfair situation as a result. On the one hand, the affidavits submitted by the government disclosed that the records sought were for use in a "criminal investigation, preliminary stage," which they argued raised sufficient doubt about the lack of a requisite civil purpose. *See United States v. Samuels, Kramer & Co., supra,* 712 F.2d at 1348. On the other hand, the limited discovery rule prevented them from developing a complete record.

Certainly neither the United States nor Canada could reasonably expect that the Internal Revenue Service would be freed from the need to employ process of court to enforce such summonses, nor that in doing so a court would be powerless to prevent abuses of its process. *See United*

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[3] The Petition for a Writ of Certiorari acknowledges that TEFRA adopted the *LaSalle* minority's suggestion for a "bright-line" test of "institutional bad faith." Petition, p. 2, fn. 2.

[4] The *Stuart* majority opinion does not, as the Petition for Writ of Certiorari argues, apply *all* domestic summons enforcement restrictions to tax treaty summons. Petition, p. 8.

States v. Powell, 379 U.S. 48, 58 (1964). The *Stuart* opinion avoids the potential for abuse of the court's process when the domestic summons restrictions on discovery are applied to a treaty summons by requiring an affirmance of lack of referral for criminal prosecution as part of the government's *prima facie* case.[5] It would be an abuse of the court's process to restrict access to essential facts even in a streamlined enforcement proceeding without first requiring an affirmative statement of nonreferral. As the *Stuart* majority opinion suggests, such a rule will further facilitate the enforcement process by setting clear standards. *Stuart,* 813 F.2d at 250.

The government's petition makes two other arguments in an attempt to justify the issuance of the writ. The petition argues that the *Stuart* decision will undermine our foreign relations with Canada and other tax treaty partners. It seems highly unlikely that that result will flow from the *Stuart* decision. The *Stuart* decision assures that foreign tax treaty summonses will be handled in an expeditious manner. *Stuart,* 813 F.2d at 250. If the IRS

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[5] It is difficult to understand how requesting an answer from Revenue Canada to the following questions "injects a new complex issue into summons proceedings." (Petition, p. 14, fn. 8):

> (1) Has Revenue Canada recommended that the Canadian Department of Justice criminally prosecute [the taxpayer] or
>
> (2) Has Revenue Canada requested the summonses at the behest of the Canadian Department of Justice? *Stuart,* 813 F.2d at 249.

In fact, the United States tardily attempted to submit alleged proof of lack of referral to the United States Court of Appeals for the Ninth Circuit. Petition, p. 7, fn. 5.

merely affirms that no referral equivalent to a Justice Department referral has taken place in the requesting country, a taxpayer would then face the burden of overcoming the government's *prima facie* case for enforcement without access to any discovery. *Stuart,* 813 F.2d at 251. This is simply not the sort of interference with the operation of treaty information exchange provisions that is likely to cause a breakdown in our foreign relations.

The third argument offered to justify issuance of the writ is founded on a statistic regarding the number of information exchange requests made. Petition, p. 21. First, the number refers to requests made *or* received. It is likely that the United States is making substantially more than one-half of those requests to other nations, significantly reducing the number of requests to which the *Stuart* decision might be applied. Second, there is no indication of the rate at which the requests received by the United States are honored by the IRS as being in compliance with a particular treaty. Nor is there any suggestion that a significant portion of summonses issued pursuant to such requests are challenged. Third, there is no evidence or argument to indicate that the period chosen for the sample is representative of prior or future activity levels. Finally, for the petition to argue that the apparent differences between the *Stuart* and *Manufacturers* cases will give the appearance of favoring one country over another is to attribute an unwarrantably low level of legal sophistication to our treaty partners.

2. There Is No Real and Embarrassing Conflict Between the Ninth and Second Circuit Courts of Appeals

The *Stuart* and *Manufacturers* decisions do not present a significant conflict between circuit courts of appeal. An example of a truly significant conflict was presented in *Donaldson v. United States,* 400 U.S. 517, 522, fn. 6 (1971), where this court noted that the interpretation of *Reisman v. Caplin,* 375 U.S. 440 (1964), by the Fifth, Second and First Circuits was in conflict with that of the Seventh, Sixth and Third Circuits justifying issuance of a writ of certiorari. Moreover, the different results in *Stuart* and *Manufacturers* can be harmonized by reviewing the factual and legal context in which they were decided.

In *Manufacturers,* the division of Revenue Canada charged with criminal tax prosecution had already considered and rejected a criminal prosecution of the taxpayers. *Manufacturers,* 703 F.2d at 50, fn. 2. By contrast, in *Stuart,* the affidavits submitted in support of the motions to enforce disclosed that the records were being sought in connection with a "criminal investigation, preliminary stage." *Stuart,* 813 F.2d at 245. The availability of discovery to rebut the government's *prima facie* case was not a significant issue in *Manufacturers.* Stuart and Kapoor were faced with a "catch 22" created by the Ninth Circuit Court of Appeals' earlier decision in *United States v. Stuckey,* 646 F.2d 1369, 1373-74 (9th Cir. 1981), *cert. denied,* 455 U.S. 942 (1982), which placed a burden of proof on them yet denied them access to the proof required to meet that burden. *United States v. Stuckey* was a well-intentioned effort to streamline summons enforcement pro-

ceedings by restricting discovery, which discovery had been subject to abuse. The *Stuart* decision corrected the anomaly without unduly interfering with the summary nature of enforcement proceedings.

The *Stuart* majority harmonized their decision with *Manufacturers* by noting TEFRA's impact on the bad faith defense, specifically the effect of 28 U.S.C. § 7602(b), (c). The adoption of a "bright line" test for determining the availability of an administrative summons in a joint civil and criminal investigation is a far cry from the quagmire which that defense presented to the Second Circuit in *Manufacturers*. The difficult inquiry that was required prior to TEFRA, which inquiry might well have offended a treaty partner, is no longer necessary. A simple, inoffensive inquiry is all that is now needed to determine whether a referral analogous to a referral to the Justice Department has taken place. A court considering the enforcement of a tax treaty summons may, under *Stuart,* prevent an abuse of its process without unnecessarily hindering the operation of treaty information exchange provisions. For these reasons, the conflict between the *Stuart* and *Manufacturers* decisions is more apparent than real.

———o———

IV. CONCLUSION

For the reasons stated above, respondents respectfully request that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Court be denied.

DATED this 8th day of April, 1988.

Respectfully submitted,

Brian L. McEachron
Carney, Stephenson, Badley,
Smith, Mueller & Spellman, P.S.

Attorneys for Respondents

Supreme Court, U.S.
FILED
JUL 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1064

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP GEORGE STUART, SR., AND MONS KAPOOR

ON WRIT OF CERTIORARI TO
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI
FILED DECEMBER 24, 1987
CERTIORARI GRANTED MAY 2, 1988

47 pp's
foldout

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1064

UNITED STATES OF AMERICA, PETITIONER

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FOR THE NINTH CIRCUIT

JOINT APPENDIX

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* The opinions and orders of the court of appeals and the district court are printed in the appendix to the petition for a writ of certiorari and have not been reproduced here.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4421

PHILIP GEORGE STUART, SR., PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
1985	
Dec. 23	Docket number assigned. JS-34 prepared. $65 sm
Dec. 23	Docket cause and entered appearances of counsel. sm
Dec. 23	CAD form sent to counsel for appellant. sm
1986	
Jan. 07	Filed appellant's Civil Appeals Docket Statement (CONFATT). sm
Jan. 15	Filed as of 01-02-86, Certificate of Record (NT). sm
FEB. 6	File order (COMFATT, WPV) releasing appeal from prebriefing reference program. Clerk to establish due date for opening brief.
FEB. 06	APLT'S OPENING BRIEF DUE MARCH 18, 1986. ru

DATE	FILINGS-PROCEEDINGS
Feb. 28	Filed appellant's motion for stay pending appeal of the 12-11-85 order of U.S. District Court of the Western District of Washington enforcing summons. (02-27-86) (CIVATT). sm
Mar. 07	Filed appellee's motion for extension of time for filing opposition to appellant's motion for stay. (03-06-86) (CIVATT). sm
Mar. 10	Filed appellant's motion for a 28-day extension of time to file the opening brief. (03-06-86) (CIVATT). sm
Mar. 19	Filed order (ANDERSON) aplt's motion of March 10, 1986, for a 28 day ext. of time in which to file his opening brief is granted. This brief shall be filed on or before April 15, 1986. jw
Mar. 19	Received late, appellee's opposition to appellant's motion for a stay pending appeal. (03-18-86) (CIVATT) (motion pending). sm
Apr. 15	Filed appellant's motion for a 30-day extension of time to file the opening brief (04-14-86) (CIVATT). sm
Apr. 25	Filed order (Anderson) aplt's motion of 4/15/86 for an ext of time to 5/15/86 in which to file the opening brief is granted. jr
May 16	Filed as of 05-15-86, appellant's motion for a $32-day extension of time to file the brief (04-14-86) (CIVATT). sm
May 19	Referred to Civatt re: pending motion for stay. jr

DATE	FILINGS-PROCEEDINGS
May 28	Filed Order (ANDERSON) Aplt's motion for an extension of time in which to file the opening brief shall be construed as a motion to stay proceedings. So construed, the motion is granted. The proceedings are stayed until aplt's motion to stay the district court's order is decided or until June 30, 1986 whichever occurs first. jw
July 14	Filed order (Fletcher, Nelson) aplt's motions for stays pending appeal are granted. Appeals 85-4421 and 86-3791 are consolidated and expedited. Both appeals are exempted from the prebriefing conference program. Aplts' brief shall be filed within 40 days after entry of this order. Subsequent briefs shall be filed in accordance with FRAP 31a. No extensions of time will be granted. The Clerk shall calendar the appeals for oral argument as soon as practicable after aplee's brief is filed. dmf
Aug. 27	Filed original and 15 copies of appellant's joint opening brief and 5 excerpts of record in 2 volumes. (30 pages) (08-25-86) Notified counsel to submit statement of related cases.
Sept. 11	Received as of 09-04-86, original and 15 copies of appellant's joint statement of related cases. sm
Oct. 1	Filed original and 15 copies of appellee's brief. (09-29-86) (40 pages). sm
Oct. 15	FILED AS OF 10-06-86, CERTIFIED COPY OF D.C. DOCKET SHEET IN LIEU OF RECORD ON APPEAL (casefile). sm

DATE	FILINGS-PROCEEDINGS
Oct. 17	Filed as of 10-16-86, Original and 15 copies of appellant's reply brief. (10-13-86) (6 pages). CALENDARED Seattle sm
Dec. 9	AS OF 12/4/86, ARGUED BEFORE & SUBMITTED TO BROWNING, WRIGHT & BOOCHEVER; DEC 4, 1986 CJJ. jr
Dec. 24	Rec'd as of 12/23/86 aple's letter dated 12/22/86 addressing questions from panel to (panel). jr
Dec. 31	Rec'd as of 12/30/86, aplt's letter dated 12/29/86 in response to aple's letter dated 12/22/86 to (panel). jr
1987	
Mar. 24	ORDERED OPINION (BOOCHEVER) FILED AND JUDGMENT TO BE FILED AND ENTERED. sm
Mar. 24	FILED OPINION – REVERSED AND REMANDED (Judge Wright dissenting) sm
Mar. 24	FILED AND ENTERED JUDGMENT. sm
Apr. 3	Filed aplee's motion for ext of time to 5/7/87 to file petition for rehearing. (panel) 4/2 -dmf-
Apr. 9	Filed aplt's bill of costs; served 4/7/87. jr
Apr. 14	Filed order (BOOCHEVER) Upon motion of the appellee in the above cases, it is hereby ordered that its motion for an extension of time until 05-07-87, in which to file petitions for rehearing or petitions for rehearing with suggestion for rehearing en banc is granted. sm
May 11	Filed as of 5/7/87 Orig & 33 Copies Aple's Petition for Rehearing With Suggestion

DATE	FILINGS-PROCEEDINGS
	for Rehearing En Banc (15 pgs); served 5/6/87 to (panel & active judges). jr
June 3	Filed order (BROWNING, WRIGHT, BOOCHEVER) It is hereby ordered that on or before twenty-one (21) days from the date of this order the appellants shall file a response to appellee's petition for rehearing with suggestion for rehearing en banc. sm
July 6	Filed as of 7/1/87 appellants' joint response to petition for rehearing & suggestion for rehearing en banc pursuant to 6/3/87 order. (11 pages); (served 6/29/87) (PANEL & ACTIVE JUDGES) ah
Aug. 27	Filed order (Browning, Wright & Boochever) the petition for rehearing is denied and the suggestion for rehearing en banc is rejected. jr
SEP. 8	MANDATE ISSUED COSTS TAXED
1988	
Jan. 7	Received from the Supreme Court of the United States, notice of filing of petition for certiorari. SC #1064, filed 12/23/87. sm
MAY 9	Rec'd notice dated 5/3/88 from Supreme Court granting petition for writ of certiorari 5/2/88. jr

DATE	FILINGS-PROCEEDINGS
MAY 17	RECEIVED ORIGINAL DISTRICT COURT FILE IN 1 VOLUME. (RECORDS)

A TRUE COPY
ATTEST JUN 14, 1988

CATHY A. CATTERSON
CLERK OF COURT

By: /s/ SYLVIA McALISTER
SYLVIA McALISTER
County Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-3791

MONS KAPOOR, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
5/2/86	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement. (jr)
5/2/86	Filed certificate of record on appeal RT filed in DC n/a [86-3791] (jr)
5/16/86	Rec'd notice of appearance of Michael L. Paup, Roger M. Olsen as counsel for appellee, USA. (dmf)
5/20/86	Filed as of 05/19/86 appellant's Civil Appeals Docketing Statement served on 5/16/86. (to CONFATT) (sm)
6/2/86	Filed as of 05/30/86, Appellant Mons Kapoor's motion to consolidate case #86-3791 with #85-4221 [86-3791]; served on 5/29/86. [37767] (CIVATT) (sm)
6/2/86	Filed as of 5/30/86, Appellant Mons Kapoor's motion to stay the March 25, 1986 order of the district court which ordered the en-

DATE	FILINGS-PROCEEDINGS
	forcement of the summons issued by IRS. [86-3791]; served on 5/29/86. [37772] (CIVATT) (sm)
6/5/86	Filed order CONFATT (NPV) releasing case from CONFATT and requesting clerk to set briefing schedule. Appellant's brief, excerpts and designation are due on 7/15/86 for Mons Kapoor. [86-3791] (jr)
6/9/86	Filed Appellee USA's opposition to appellant's motion for a stay pending appeal, served on 6/6/86. (CIVATT) [Entry date 6/10/86] (sm)
7/14/86	Filed order, in 85-4421, (FLETCHER, NELSON) aplts' motions for stays pending appeal are granted. Appeals 85-4421 and 86-3791 are consolidated and expedited. Both appeals are exempted from the prebriefing conference program. Aplts' opening brief shall be filed within 40 days after entry of this order. Subsequent briefs shall be filed in accordance with FRAP 31a. No extensions of time will be granted. The Clerk shall calendar the appeals for oral argument as soon as practicable after aplee's brief is filed. [86-3791] (dmf)
8/28/86	Filed in 85-4421 original and 15 copies Appellant Mons Kapoor's opening brief 30 pages and 5 excerpts of record in 2 volumes, with minor deficiencies, served on 8/25/86. Notified counsel. [86-3791] (sm)

DATE	FILINGS-PROCEEDINGS
9/11/86	Received as of 09/04/86, in #85-4421, Appellant Philip George Stuart, Sr. and Appellant Mons Kapoor satisfaction of (minor) brief (joint statement of related cases) deficiency. [86-3791] (sm)
10/1/86	Filed in 85-4421, original and 15 copies appellee USA's 40 pages brief, with excerpts of record of 0 volumes, served on 9/29/86. [86-3791] appellant's reply brief is due 10/20/86 for Mons Kapoor (sm)
10/2/86	Recvd in 85-4421 as of 10/1 notice of appearance of Charles E. Brookhart John Aa. Dudeck Jr. as csls for Aple USA [86-3791] (vm)
10/6/86	Filed Certifed copy of d.c. docket sheet in lieu of record on appeal. (casefile) [86-3791] [Entry date 10/8/86] (sm)
10/17/86	Filed in 85-4421, original and 15 copies Appellant Mons Kapoor opreply brief 6 pages, and served on 10/13/86. [86-3791] (dmf)
10/17/86	CALENDARED: SE 12/4/86 9:00 a.m. (dd)
10/22/86	INVENTORIED [86-3791] (mm)
12/11/86	ARGUED BEFORE AND SUBMITTED 12/4/86 TO: James R. BROWNING, Eugene A. WRIGHT & Robert BOOCHEVER; CJJ. [86-3791] (jr)
12/24/86	Received as of 12/23/86 in 85-4421, appellee's (USA) letter dated 12/22/86 addressing questions from panel to (panel). [86-3791] (jr)
3/24/87	FILED OPINION (BROWNING, WRIGHT, Dissenting, BOOCHEVER, Author),

DATE	FILINGS-PROCEEDINGS
	Termination on the merits after oral argument (Reversed and Remanded) FILED AND ENTERED JUDGMENT [86-3791] (sm) [Entry date 3/25/87]
3/24/87	JS-34 disposition reported. Termination on the merits after oral argument (Reversed and Remanded) [86-3791] (sm) [Entry date 3/25/87]
4/3/87	Filed, in 85-4421, appellee's USA motion to extend time to file petition for rehearing to 5/7/87, [86-3791] served on 4/2/87 [117307] (PANEL) (dmf) [Edit date 4/3/87]
4/14/87	Filed order (BOOCHEVER) Upon motion of the appellee in the above cases, it is hereby ordered that its motion for an extension of time until 05/07/87, in which to file petitions for rehearing or petition for rehearing with suggestion for rehearing en banc is granted. [117307-1] [86-3791] (sm)
5/11/87	[129933] Filed as of 05/07/87 in 85-4421 original and 33 copies Appellee USA petition for rehearing with suggestion for rehearing en banc 15 pages, served on 5/6/87 to (panel & active judges). [86-3791] (jr) [Edit date 5/11/87]
6/3/87	Filed order (BROWNING, WRIGHT, BOOCHEVER) It is hereby ordered that on or before twenty-one (21) days from the date of this order the appellants shall file a response to appellee's petition for rehearing with suggestion for reheaiing en banc. [86-3791] (sm)

DATE	FILINGS-PROCEEDINGS
7/6/87	Filed as of 7/1/87 appellants' joint response to petition for rehearing and suggestion for rehearing en banc pursuant to 6/3/87 order (11 pages) served 6/29/87. (PANEL & ACTIVE JUDGES) [86-3791] (ah)
8/27/87	Filed in 85-4421, order (BROWNING, WRIGHT & BOOCHEVER) the petition for rehearing is denied and the suggestion for rehearing en banc is rejected. [129933-1] [86-3791] (jr)
9/8/87	MANDATE ISSUED. Costs taxed. [86-3791] (dmf)
1/7/88	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 87-1064 filed on 12/23/87. (sm)
5/9/88	Received notice from Supreme Court, petition for certiorari GRANTED on 5/2/88 (jr)

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

No. C84-511

PHILIP GEORGE STUART, SR., PLAINTIFF

v.

UNITED STATES OF AMERICA,
FOR THE DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, DEFENDANT

DOCKET ENTRIES

DATE	NR	FILINGS-PROCEEDINGS
1984		
Apr 20	1	Petition to quash summons & Issued s/c
Apr 24	2	RETURN OF SERVICE – of s/c upon U.S.A. on 4-23-84;
Apr 25	3	AFFIDAVIT OF SERVICE – of s/c upon U.S.A. on 4-23-84
Apr 27	4	ORDER OF REFERENCE – and directing responses, to Mag Weinberg. CC to C, Judge, Mag (4-27-84)
Jun 29	5	RESPONSE – defts, in opposition to petition to quash IRS.
Jun 29	6	OBJECTIONS – defts, to petitioner's use of discovery
Jun 29	7	MOTION – defts, for summary enforcement (Not noted, but to be noted shortly)
Jun 29	8	MEMORANDUM – in support of motion

DATE	NR	FILINGS-PROCEEDINGS
Jun 29	9	AFFIDAVIT – of Thomas J. Clancy
Jun 29	10	DECLARATION – of Deborah Gavin (unsigned)
Jun 29	11	PRAECIPE – stating that the Declaration will be signed by Deborah Gavin after July 17, 1984.
Jun 29	12	CERTIFICATE – of service
Jul 3	13	NOTICE – of motion re: mt for summary enforcement, *Noted for 7-20-84*
Jul 17	14	DECLARATION – of Deborah Gavin (signed)
Jul 23	15	MEMORANDUM – of petitioner in opposition to respondent's mtn for summary enforcement
Jul 23	16	AFFIDAVIT – of Brian L. McEachron
Jul 23	17	SERVICE – certificate of mlg #15 & #16
Jul 27	18	MINUTE ENTRY – Oral argument heard before Mag Weinberg, Matter taken under submission
Aug 21	19	STATUS MEMORANDUM – file review set for Nov. 15, 1984.
Dec 5	20	STATUS MEMORANDUM – file review set for Jan. 31, 1985.
1985		
Feb 8	21	STATUS MEMORANDUM – file review set for May 2, 1985
May 7	22	STATUS MEMORANDUM – file review set for June 27, 1985
July 8	23	STATUS MEMORANDUM – matter still pending b4 Mag. Weinberg. File review 10/10/85

DATE	NR	FILINGS-PROCEEDINGS
Sept 30	24	REPORT & RECOMMENDATION – by Mag Weinberg, Objs due 10-14-85.
Sept 30	–	LODGED ORDER
Oct 15	25	OBJECTIONS – to R & R, *Noted for Nov 1, 1985.*
Oct 15	26	CERTIFICATE – of service
Oct 22	27	STATUS MEMORANDUM – file review set for Nov 14, 1985
Oct 29	28	RESPONSE – defts, to plts objections to Mag. Weinberg R & R
Nov 1	29	ORDER ENFORCING IRS SUMMONS – Court adopts R & R, Petitioner's request that the US be required to respond to petitioner's interrogatories is denied; Petition to quash summons is denied.; Motion for summary enforcement is granted; Within 30 days from entry of this order, respondent shall submit an appropriate form of order for enforcement of the summons. C to C, Judge, Mag (Ent 11-1-85)
Nov 29	–	LODGED FINAL JUDGMENT AND ENFORCEMENT ORDER
Dec 11	30	FINAL JUDGMENT AND ENFORCEMENT ORDER – Petition to quash summons is denied, & NW Commercial Bank shall comply with and obey the summons served upon it. C to C, Ju Bank, Mag (ent 12-11-85)
Dec 17	31	NOTICE OF APPEAL – by petr from judgment ent 12/11/85.

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

No. C84-512

MONS KAPOOR, PLAINTIFF

v.

UNITED STATES OF AMERICA,
FOR THE DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, DEFENDANT

DOCKET ENTRIES

DATE	NR	FILINGS-PROCEEDINGS
Apr 20	1	PETITION – to quash summons s/c iss
Apr 25	2	ORDER – of reference to JLW cys mld 4-25-84
Apr 24	3	RETURN – of service of s/c on legal messengers 4-23-84
Apr 24	4	SERVICE – affidavit of s/c on U.S.Atty (Cindy Cook) 4-23-84
Jun 27	5	RESPONSE – of deft in opposition to petition to quash
Jun 27	6	OBJECTIONS – of US to petitioner's use of discovery
Jun 27	7	MOTION – of deft for summary enforcement 7-13-84
Jun 27	8	MEMORANDUM – in support of enforcement
Jun 27	9	AFFIDAVIT – of Thomas J. Clancy
Jun 27	10	SERVICE – certificate of #5-10

DATE	NR	FILINGS-PROCEEDINGS
Jun 28	11	PRAECIPE—with attached unsigned affidavit of Deborah Gavin for court's consideration
Jul 17	12	DECLARATION of Deborah Gavin
Jul 23	13	MEMORANDUM of plft in opposition to #7
Jul 23	14	AFFIDAVIT of Brian L. McEachron
Jul 23	15	CERTIFICATE of serv of #13 & 14
Jul 27	–	HEARING HAD b4 JLW. Oral argument heard. Matter under submission.
Sep 1	16	REPORT & RECOMMENDATION by JLW for enforcement of IRS summons Objs due 10/14/85
Sep 1	–	LODGED order enforcing I.R.S. summons
Sep 15	17	OBJECTION to R & R for enforcement of IRS summons noted: 11/1/85
Sep 15	18	CERTIFICATE of srvc of mlg of #17 upon dtfs cnsl
Nov 29	19	RESPONSE by USA to petitioners obj to Mag's R&R for enforcemtn
Nov 29	–	LODGED final judgment & enforcement Order
1986		
Mar 25	20	FINAL JUDGMENT & ORDER that petition to quash summons is denied; NW Commercial Bank Shall comply w/and obey summons served upon it, by appearing at ofc of IRS, Bellingham B4 special Agent Deborah Gavin or her designee at time agreed upon by ptys but not later than 20 days after entry of order, then & there

DATE	NR	FILINGS-PROCEEDINGS
		to testify & produce for inspection & cy all of books, papers, records & other data described in summons served upon it, such appearance, testimony, inspection & cy to continue from dy to dy until complete. ent & mld 3/25/86
Apr 15	21	NOTICE OF APPEAL—by ptr from Order ent 3/25/86. (ent. 4/15/86)
Apr 15	22	AFFIDAVIT of mailing.
Apr 15	–	Mailed appeal packet to CCA, cc to cnsl. Cert of Rec incl.

UNITED DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C84-511

PHILIP GEORGE STUART, SR., PETITIONER

v.

UNITED STATES OF AMERICA,
FOR THE DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, RESPONDENT.

PETITION TO QUASH SUMMONS
26 U.S.C. § 7609(b)(2)

[Filed April 20, 1984]

COMES NOW petitioner Philip George Stuart, Sr. and alleges as follows:

JURISDICTION AND VENUE

1. This court has jurisdiction under 26 U.S.C. § 7609(h)(1) over this proceeding which is brought pursuant to 26 U.S.C. § 7609(b)(2) to quash the summons issued to Northwestern Commercial Bank, a third-party recordkeeper within the meaning of 26 U.S.C. § 7609(a)(3).

2. Venue is proper in this court because the subject summons, a true and correct copy of which is attached hereto as Exhibit A and incorporated by reference herein, was received by Northwestern Commercial Bank within this district.

PARTIES

3. Petitioner Philip George Stuart, Sr. is an individual Canadian citizen residing in Powell River, British Columbia who is not a resident or taxpayer of the United States. The records sought in the subject summons relate to petitioner.

4. Respondent United States of America is a sovereign country acting through the Department of the Treasury, Internal Revenue Service in issuing the subject summons.

CLAIM FOR RELIEF

5. Petitioner is informed and believes that the subject summons was issued on or about April 2, 1984, by Deborah Gavin and Karl Marrig, agents and employees of respondent.

6. The summons does not seek examination of books, paper, records or data which is relevant to any inquiry concerning an Internal Revenue tax of the United States nor does it seek to examine any witness in connection therewith. The sole purpose of the summons is to obtain information regarding a Canadian citizen's possible liability for Canadian income taxes under the Canadian Income Tax Act, which information can be requested directly under the applicable Canadian statutes and regulations.

7. The summons was not issued for any of the lawful purposes set forth in 26 U.S.C. §§ 7602, 6420(e)(2), 6421(f)(2) or 6427(h)(2). In issuing the summons without the necessary statutory authority, respondent has failed to follow administrative procedures required by the Internal Revenue Code.

8. Petitioner is informed and believes and on that basis alleges that respondent failed to give the notice of service of the summons required by 26 U.S.C. § 7609(a) by failing

to give said notice within three days of the day on which service was made.

PRAYER

For the reasons stated above, petitioner respectfully prays that:

1. This court enter an order quashing the subject summons and provide that notice to the third-party record-keeper identified above be given; and

2. For such other and further relief as this court may deem warranted.

DATED this 20th day of April, 1984.

Respectfully submitted:

CARNEY, STEPHENSON,
BADLEY, SMITH &
MUELLER

By: /s/ BRIAN L. McEACHRON
BRIAN L. McEACHRON
Of Attorneys for Petitioner

--- Summons

Department of the Treasury
Internal Revenue Service

(15)

Philip George Stuart Sr.
R.R. #3, Maitland Road
Powell River, B.C.

In the matter of the Canadian tax liability of

Internal Revenue District of Foreign Operations District

Periods 1980, 1981 and 1982

The Commissioner of Internal Revenue

To Northwestern Commercial Bank
P.O. Box 819

At Bellingham, Washington 98227

acting pursuant to an exchange of information request from the Department of National Revenue, Canada, under Articles XIX and XXI of the United States - Canada Income Tax Convention of 1942 (as amended).

You are hereby summoned and required to appear before Deborah Gavin

an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

All records in your possession, custody, or control pertaining to accounts in the name of Philip George Stuart, Sr., R.R. #3, Maitland Road, Powell River, B.C., pertaining to account number 1712-549131, for the period January 1, 1980 through December 31, 1982, to include, but not limited to, the following items:

1. All documents reflecting loan transactions, including application forms, collateral pledged or other guarantees, letters of credit, financial statements, transfer accounts and correspondence; and

2. All documents reflecting bonds, stocks and/or other investment transactions.

Business address and telephone number of Internal Revenue Service officer named above:

Rm 2418, 915 Second Avenue, Seattle, WA (206) 442-5576

Place and time for appearance:

at 104 West Magnolia, Bellingham, WA

on the 1st day of May, 19 84 at 1 o'clock P. M.

Issued under authority of the Internal Revenue code this 2nd day of April, 19 84

Deborah J. Gavin — Special Agent
Signature of Issuing Officer — Title

Signature of Approving Officer (if applicable) — Title

Part C — To be given to noticee

EXHIBIT A

Form 2039-C (Rev. 12-83)

IN THE UNITED STATES COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

No. C84-511

PHILIP GEORGE STUART, SR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

RESPONSE IN OPPOSITION TO PETITION TO QUASH INTERNAL REVENUE SUMMONS

The defendant United States of America responds as follows to the Petition to Quash Internal Revenue summons filed in this case:

GENE S. ANDERSON
United States Attorney

CHRISTOPHER L. PICKRELL
Assistant U.S. Attorney

F. MICHAEL KOVACH, JR.
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6605

FIRST DEFENSE

The petition fails to state a claim upon which relief may be granted. Respondent has shown by the affidavits of Special Agent Deborah Gavin and Mr. Thomas J. Clancy that each of the *Powell* requirements for enforcement of this summons has been met. Petitioner has failed to assert any valid objections to enforcement.

SECOND DEFENSE

The United States of America responds to the Petition to Quash as follows:

1. Admits.
2. Admits.
3. Admits.
4. Admits.
5. Admits.
6. Denies that the Canadian authorities can obtain the information sought by requesting that information directly. Petitioner's resistance to this summons suggests the contrary. The Canadian authorities have no authority to serve and enforce Canadian summonses against United States banks, but may seek the aid of the United States under the Income Tax Convention with Canada of March 4, 1942, 56 Stat. 1399. Admits the remaining allegations.
7. Denies.
8. Denies.

In further response and pursuant to Code Sections 7402(b) and 7609(b)(2)(A), the United States states as follows:

9. This Court has subject matter jurisdiction to enforce and to compel compliance with this Internal Revenue summons pursuant to Code Sections 7402(b), 7604(a) and 7609(b)(2)(A).

10. Deborah J. Gavin, who issued the summons, is a Special Agent with the Criminal Investigation Division of the Internal Revenue Service, employed in the Seattle, Washington Revenue District. Special Agent Gavin is authorized to issue Internal Revenue summonses under the authority of Section 7602. Treas. Reg., §301.7602-1, 26 C.F.R. Sec. 301.7602-1; I.R.S. Delegation Order No. 4 (as revised).

11. The summoned party, Northwestern Commercial Bank, is located in Bellingham, Washington, within the jurisdiction of this Court.

12. Mr. Philip Pinkus, Director, Provincial and International Relation Division, Revenue Canada, a competent authority of the Canadian Government, requested information regarding Philip George Stuart, Sr., a Canadian citizen, pursuant to Articles XIX and XXI of the Income Tax Convention with Canada, March 4, 1942, (56 Stat. 1399). The Canadian taxing authorities' investigation of Mr. Stuart is a criminal investigation, preliminary stage.

13. The Director of Foreign Operations District, Internal Revenue Service, Mr. Thomas J. Clancy, or his delegate, reviewed the request and directed that an agent be assigned to investigate loan and investment transactions of Philip George Stuart, Sr., for 1980, 1981 and 1982.

14. The District Director is a competent authority for purposes of administering routine and specific exchange of information programs pursuant to tax treaties.

15. The District Director specifically determined the following:

(a) that the Canadian request regarding Mr. Stuart is within Articles XIX and XXI of the Convention and that it is appropriate for the United States to honor the request;

(b) the same type of information can be obtained by the taxing authorities under Canadian law;

(c) the requested information is relevant to a determination of Mr. Stuart's correct Canadian tax liability; and

(d) the information sought is not in the possession of the Internal Revenue Service or the Canadian taxing authorities.

16. Special Agent Gavin was assigned to investigate loan and investment transactions of Mr. Stuart for 1980, 1981 and 1982.

17. Pursuant to her investigation, Special Agent Gavin issued an Internal Revenue summons, form 2039, on April 2, 1984, directed to Northwestern Commercial Bank of Bellingham, Washington.

18. On that same day, April 2, 1984, she personally served the summons by handing an attested copy to Jane Todahl, an employee of the bank who is authorized to accept service.

19. On April 3, 1984, she gave notice of the service of the summons to Philip George Stuart, Sr., by registered mail addressed to his last known address at R.R. #3, Maitland Road, Powell River, British Columbia, Canada.

21. The summoned party is in possession of books, records, papers or other data relating to Stuart's loan and investment transactions during the years under investigation.

22. Those books and papers sought by the summons may shed light on Mr. Stuart's liabilities and are relevant.

WHEREFORE, the United States of America, respectfully requests as follows:

(1) That the Court deny the Petition to Quash without further hearing;

(2) That the Court find that Northwestern Commercial Bank is obligated to produce the records sought by the summons; and

(3) That the Court grant such other and further relief as is just and proper.

GENE S. ANDERSON
United States Attorney
CHRISTOPHER L. PICKRELL
Assistant U.S. Attorney

/s/ HELEN L. DUNCAN FOR
F. MICHAEL KOVACH, JR.
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6605

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF WASHINGTON

No. C84-511

PHILIP GEORGE STUART, SR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

AFFIDAVIT OF THOMAS J. CLANCY

District of Columbia)
) ss
City of Washington)

THOMAS J. CLANCY, being first duly sworn, deposes and says:

1. I am Director of Foreign Operations District, Internal Revenue Service, Washington, D.C. I have served as Director since May 16, 1982, and as Acting Director from March 21, 1982, until my formal appointment. Pursuant to Commissioner of Internal Revenue Delegation Order No. 114 (Rev. 3), issued March 21, 1982, a copy of which is attached to this affidavit, authority to act as "competent authority" for the purpose of administering Routine and Specific Exchange of Information Programs pursuant to tax treaties, including the Convention between the United States of America and Canada, signed March 4, 1942, was delegated to the Director, Foreign Operations District.

2. By letter dated January 3, 1984, the Government of Canada, through Mr. Philip Pinkus, Director, Provincial and International Relations Division, Revenue Canada, made a request for information to be used to determine

the correct tax liability of Mr. Philip George Stuart, Sr., under the laws of Canada. The Canadian taxing authorities' investigation of Mr. Stuart is a criminal investigation, preliminary stage.

3. As competent authority on behalf of the United States, I have determined that the Canadian request for information regarding Mr. Stuart is within Articles XIX and XXI of the Convention. I have further determined that it is appropriate for the United States to honor this request by its treaty partner and thereby lend assistance and support to Canada, as the Convention contemplates.

4. I am satisfied that the requested information is not within the possession of the Internal Revenue Service or the Canadian tax authorities; that the requested information may be relevant to a determination of the correct tax liability of Mr. Stuart under Canadian law; and that the same type of information can be obtained by tax authorities under Canadian law.

5. It is the understanding of the parties to the Convention, and has been throughout its administration, that information exchanged will only be used by the requesting state to secure the correct application of the provisions of the Convention or of its domestic laws concerning the taxes covered by the Convention.

6. Exchanged information may only be disclosed as required in the normal administrative or judicial process operative in the administration of the tax system of the requesting country. Improper use of information furnished for income tax purposes would be protested, and, if not discontinued would lead to recommendations to discontinue exchanges of information.

7. It is the practice of the United States competent authority to stamp information exchanged pursuant to an

income tax treaty, including the United States-Canada Income Tax Convention, as follows:

> This information was secured under the provisions of an Income Tax Treaty with a foreign government and its use and disclosure must be governed by the provisions of such treaty.

The Canadian competent authority imposes a similar restriction in each cover letter transmitting information supplied to the United States and the United States competent authority stamps such information as stated above.

Executed this 21st day of June, 1984.

/s/ THOMAS J. CLANCY
THOMAS J. CLANCY
District Director
Foreign Operations District

Subscribed and sworn to before me this 21st day of June, 1984.

/s/ DEBBIE A. HALLAND
NOTARY PUBLIC

My commission expires: October 14, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C84-511W

PHILIP GEORGE STUART, SR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

DECLARATION OF DEBORAH GAVIN

Received July 18, 1984

DEBORAH GAVIN deposes and declares as follows:

1. I am employed as a special agent in the Criminal Investigation Division of the Internal Revenue Service, Seattle District, with my post of duty at 915 Second Avenue, Seattle, Washington.

2. In my capacity as a special agent, I am seeking all records pertaining to loan and investment transactions of Philip George Stuart, Sr., a resident of Canada, for the taxable years 1980, 1981 and 1982.

3. This investigation was initiated as a result of a request for information by a competent authority of Canada made pursuant to Articles XIX and XXI of the Income Tax Convention with Canada, March 4, 1942, and at the direction of the Director of the Foreign Operations District of the Internal Revenue Service. There is no pending investigation of Mr. Stuart respecting his tax liabilities under the laws of the United States.

4. I understand that the information is sought by Canadian tax authorities in connection with a criminal tax investigation, preliminary stage, to determine the correct income tax liabilities of Philip George Stuart, Sr., under the laws of Canada for the years 1980, 1981 and 1982.

5. On April 2, 1984, I issued an Internal Revenue summons, form 2039, a copy of which is Exhibit A to this declaration. The summons directs Northwestern Commercial Bank to appear to testify and to produce for examination the books, records, and other documents described in the summons. I served the summons on Northwestern Commercial Bank by handing an attested copy to Jane Todahl on April 2, 1984.

6. On April 3, 1984, I mailed by registered mail addressed to Philip George Stuart, Sr., R.R. #3, Maitland River, Powell River, British Columbia, notice of the service of the summons and a copy of the summons.

7. Northwestern Commercial Bank is in possession or control of the books, records, and other papers or has knowledge relating to the above-described investigation.

8. A petition to quash the subject summons was filed by Philip George Stuart, Sr., on April 20, 1984.

9. At the direction of Mons Kapoor, Northwestern Commercial Bank has refused and continues to refuse to comply with the summons.

10. Neither I nor the Internal Revenue Service possesses the books, records, and other documents demanded by the summons.

11. The books, records, and other documents demanded by the summons are necessary to the completion of my investigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of July, 1984.

DEBORAH J. GAVIN

DEBORAH GAVIN
Special Agent
Internal Revenue Service

Service of Summons, Notice and Recordkeeper Certificates

(Pursuant to section 7603, Internal Revenue Code)

(29)

I certify that I served the summons shown on the front of this form on:

Date: 1-2-84 Time: 1:00 PM

How Summons Was Served

- [X] I handed an attested copy of the summons to the person to whom it was directed.
- [ ] I left an attested copy of the summons at the last and usual place of abode of the person to whom it was directed. I left the copy with the following person (if any).

Signature: [illegible] Title: Special Agent

This certificate is made to show compliance with section 7609 Internal Revenue Code. This certificate applies only to summonses served on third-party recordkeepers and not to summonses served on other third parties or any officer or employee of the person to whose liability the summons relates nor to summonses in aid of collection, to determine the identity of a person having a numbered account or similar arrangement or to determine whether or not records of the business transactions or affairs of an identified person have been made or kept.

I certify that within 3 days of serving the summons I gave notice (Form 2039-D) to the person named below on the date and in the manner indicated.

Date of Giving Notice: 1-3-84 Time: 2:00 PM

Name of Noticee: Philip George Stewart Sr, [illegible]

Address of Noticee (if mailed): Maitland Rd, [illegible]

How Notice Was Given

- [X] I gave notice by certified or registered mail to the last known address of the noticee
- [ ] In the absence of a last known address of the noticee, I left the notice with the person summoned
- [ ] I gave notice by handing it to the noticee
- [ ] I left the notice at the last and usual place of abode of the noticee. I left the copy with the following person (if any)
- [ ] No notice is required

Signature: [illegible] Title: Special Agent

I certify that the period prescribed for beginning a proceeding to quash this summons has expired and that no such proceeding was instituted or that the noticee consents to the examination.

Signature: _____ Title: _____

Form 2039 (Rev. 12-83)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C84-511

PHILIP GEORGE STUART, SR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

AFFIDAVIT OF BRIAN L. McEACHRON

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

BRIAN L. McEACHRON, being first duly sworn, deposes and says as follows:

1. He makes this affidavit based on personal knowledge and if called upon to testify regarding matters asserted herein, would be competent to do so.

2. He is a member of the bar of this Court, duly licensed to practice law and is an associate of Carney, Stephenson, Badley, Smith & Mueller, attorneys of record for Petitioner.

3. On June 28, 1984, pursuant to the requirements of Local Civil Rule 37, he conferred by telephone with F. Michael Kovach, Jr., the trial attorney, Tax Division, U.S. Department of Justice assigned to this proceeding, regarding the Respondent's objections to the Petitioner's request for discovery and its failure and refusal to provide any discovery whatsoever. (True and correct copies of Petitioner's discovery requests and Respondent's responses

thereto are attached as Exhibits A and B respectively). Mr. Kovach was informed that the telephone conference was being undertaken in compliance with Civil Rule 37 preliminary to Petitioner filing a Motion to Compel Discovery if necessary. Mr. Kovach explained the government's position was absolute and no discovery would be provided to Petitioner absent a court order.

4. Mr. Kovach further informed the undersigned that the letter dated January 3, 1984 from Mr. Philip Pinkus, Director, Provincial and International Relations Division, Revenue Canada, which made the request for information, had not been revealed to him. Mr. Kovach stated that it was the practice of the Internal Revenue Service to consider such letters "Secret".

5. Attached to my affidavit are true and correct copies of the following Canadian statutes and court decisions as Exhibits *C* through *H* respectively: Canadian Charter of Rights and Freedoms, Constitution Act, 1981; Canadian Income Tax Act § 231; *Minister of Nat'l. Revenue v. Coopers & Lybrand,* 78 D.Tax 6528 (1978); *New Garden Restaurant and Tavern, Ltd., et al. v. Minister of Nat'l. Revenue,* 83 D.Tax 5338 (Ont. High Court of Justice, 1983); *Lipsey v. Minister of Nat'l Revenue,* 84 D.Tax 6192 (Fed. Ct.—Trial Div. 1984); and *Kruger v. Minister of Nat'l Revenue,* 83 D.Tax 5322 (Fed. Ct.—Trial Div., 1983).

FURTHER AFFIANT SAITH NAUGHT.

/s/ BRIAN L. McEACHRON
BRIAN L. McEACHRON

SUBSCRIBED AND SWORN to before me this 23rd day of July, 1984.

/s/ LUCY E. OBERNDORF
Notary Public in and for the
State of Washington
residing at Seattle.

Exh. A

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C84-511

PHILIP GEORGE STUART, SR., PETITIONER

v.

UNITED STATES OF AMERICA,
FOR THE DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, RESPONDENT

PETITIONER'S FIRST SET OF INTERROGATORIES TO RESPONDENT UNITED STATES OF AMERICA

TO: Respondent, United States of America; and

TO: Its Attorneys of Record:

Petitioner PHILIP GEORGE STUART, SR. hereby requests, pursuant to Rule 33, Federal Rules of Civil Procedure, that you answer each of the following interrogatories separately and fully in writing under oath and serve a copy of the answers on petitioner's counsel of record, Brian L. McEachron, of Carney, Stephenson, Badley, Smith & Mueller, P.S., 17th Floor Park Place Building, Seattle, Washington 98101, on or before June 18, 1984.

Exh. A

INTERROGATORIES

Interrogatory No. 1: Give the full name, title, business address, and branch, division, or section assignment of the person or persons in the Department of National Revenue, Canada, who made the request giving rise to the summons sought to be quashed in this action.

ANSWER:

Interrogatory No. 2: Did the person or persons identified above in your response to Interrogatory No. 1 state any reasons for making the request? If so, please state the reasons given.

ANSWER:

Interrogatory No. 3: Did any other person employed by the Department of National Revenue, Canada, or any

other Canadian government agency, including, but not limited to the Royal Canadian Mounted Police, give any reason for the request to exchange information? If so, please state the reasons given.

ANSWER:

Interrogatory No. 4: Was the request giving rise to the summons sought to be quashed in this action made in writing? If so, please identify any documents constituting, referring to, or summarizing said request by giving a description of the type of document, its author, its addressees, its date and a summary of its contents.

ANSWER:

Interrogatory No. 5: Has any person informed you that the request for information made by the Department of National Revenue, Canada, is part of an ongoing or contemplated criminal investigation?

ANSWER:

Interrogatory No. 6: If your answer to the preceding interrogatory is affirmative, please give the full name, title, business address and branch, division, or section assignment of the person or persons who made such representation, identifying the date any such representation was made and its form, e.g., letter, telephone call, face-to-face communication.

ANSWER:

DATED this 15th day of May, 1984.

CARNEY, STEPHENSON, BADLEY,
SMITH & MUELER, P.S.

By: /s/ BRIAN L. MCEACHRON
BRIAN L. MCEACHRON
Of Attorneys for Petitioner

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

_____, being first duly sworn, on oath deposes and says: I am authorized to represent and to act on behalf of the United States of America, for the Department of the Treasury, Internal Revenue Service, regarding the above-entitled action; I have read the within and foregoing Interrogatories to Respondent and Answers Thereto, know the contents thereof, and believe the same to be true.

_____

SUBSCRIBED AND SWORN to before me this ____ day of ____, 1984.

_____
NOTARY PUBLIC in and for the State of Washington, residing at

_____

Exh. B

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

No. C84-511

PHILIP GEORGE STUART, SR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

UNITED STATES' OBJECTIONS TO PETITIONER'S USE OF DISCOVERY

The United States of America objects to Petitioner's use of discovery and each and every interrogatory propounded on the following grounds:

GENE S. ANDERSON
United States Attorney

CHRISTOPHER L. PICKRELL
Assistant U.S. Attorney

F. MICHAEL KOVACH, JR.
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6605

1. This case involves the enforcement of an Internal Revenue Service summons.

2. To obtain even an evidentiary hearing in a summons enforcement case, petitioner must demonstrate with specific, sworn statements that there exists a triable issue on a legally sufficient defense to the enforcement of the summons. *United States* v. *Sherman,* 627 F. 2d 189 (9th Cir. 1980).

3. Even when such a triable issue is demonstrated, an evidentiary hearing is scheduled to determine if the petitioner has made "a substantial demonstration of abuse." *United States* v. *Will,* 671 F.2d 963, 968 (6th Cir. 1982).

4. Petitioner has not shown that such a triable issue exists. Consequently, he is not entitled to an evidentiary hearing and cannot obtain discovery.

Respectfully submitted this 21st day of June, 1984.

GENE S. ANDERSON
United States Attorney

CHRISTOPHER L. PICKRELL
Assistant U.S. Attorney

/s/ HELEN L. DUNCAN FOR
F. MICHAEL KOVACH, JR.
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6605

Supreme Court of the United States

No. 87-1064

UNITED STATES, PETITIONER

v.

PHILLIP GEORGE STUART, SR., ET AL.

ORDER ALLOWING CERTIORARI. Filed May 1, 1988.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60815

Supreme Court, U.S.
FILED
JUL 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1064

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP GEORGE STUART, SR., AND MONS KAPOOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM S. ROSE, JR.
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

CHARLES E. BROOKHART
JOHN A. DUDECK, JR.
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Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, in issuing an administrative summons pursuant to a request for information made by a tax treaty partner, the Commissioner of Internal Revenue is required to state that the foreign tax investigation has not reached a stage analogous to a domestic tax investigation's referral to the Justice Department for criminal prosecution.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1064

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP GEORGE STUART, SR., AND MONS KAPOOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 813 F.2d 243. The enforcement orders of the district court (Pet. App. 25a-26a, 34a-35a) and the opinions of the magistrate (Pet. App. 27a-33a, 36a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a-23a) was entered on March 24, 1987. A petition for rehearing was denied on August 27, 1987 (Pet. App. 24a). On November 18, 1987, Justice O'Connor extended the time to petition for a writ of certiorari to and including December 24, 1987. The petition was filed on December 23, 1987, and was granted on May 2, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND TREATY INVOLVED

Articles XIX and XXI of the Convention Respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1405, 1406, and Section 7602 of the Internal Revenue Code are set out in the appendix (App., *infra,* 1a-4a).

STATEMENT

1. Section 7602(a) of the Internal Revenue Code[1] gives the Commissioner the authority to summon papers and witnesses for examination for the purpose of ascertaining tax liabilities. The district courts are empowered to enforce summonses upon a prima facie showing by the Commissioner that the summons was issued in "good faith," *i.e.*, in furtherance of a legitimate purpose authorized by Congress. I.R.C. § 7604; *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). Section 7602(c) of the Code, added by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 333(a), 96 Stat. 622, provides that a summons may not be issued when there is in effect a referral to the Justice Department for criminal prosecution.[2] Such a referral is defined by the statute as

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2] This requirement first arose out of this Court's decision in *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978). Construing the pre-TEFRA version of Section 7602, the Court there held (5-4) that the IRS may issue a summons as long as it has not made a Justice Department referral and has "not abandon[ed] in an institutional sense * * * the pursuit of civil tax determination or collection" (437 U.S. at 318). The dissenting Justices argued for a bright-line test turning entirely upon whether a recommendation for prosecution has already been made to the Justice Department (*id.* at 320-321 (Stewart, J., dissenting)). The TEFRA amendments essentially adopted the dissenting position. TEFRA also added Section 7602(b), which made explicit that an inquiry into the possibility that a criminal offense has been committed is a legitimate purpose for the issuance of a summons.

being in effect if (1) the IRS has recommended a grand jury investigation or prosecution to the Justice Department or (2) the Justice Department has requested otherwise confidential return information from the IRS for use in a criminal tax investigation (I.R.C. § 7602(c)(2)).

The United States has entered into tax treaties with other nations that provide, among other things, for the exchange of information to assist each other in administration of the tax laws. The information exchange agreement between the United States and Canada that is applicable to this case is found in Articles XIX and XXI of the Convention Respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1405, 1406 [hereinafter 1942 Convention]. Article XIX provides that, "[w]ith a view to the prevention of fiscal evasion," each country undertakes to furnish to the other "information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws" and that "may be of use * * * in the assessment of the taxes to which this Convention relates." Article XXI provides that, if the Canadian Minister "in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner [of Internal Revenue], the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States." These treaty provisions have been held to contemplate use of domestic summons enforcement procedures by the Commissioner of Internal Revenue to assist a treaty partner in a foreign tax investigation, even though no United States taxes are involved. See Pet. App. 7a; *United States* v. *A.L. Burbank & Co.*, 525 F.2d 9 (2d Cir. 1975), cert. denied, 426 U.S. 934 (1976).[3]

[3] A new Income Tax Convention between the United States and Canada became effective after the issuance of the summonses involved

2. Respondents are citizens and residents of Canada who have bank accounts with the Northwestern Commercial Bank in Bellingham, Washington. The Canadian Department of National Revenue (Revenue Canada)—the Canadian equivalent to the Internal Revenue Service (IRS)—is attempting to determine respondents' income tax liabilities under Canadian law for tax years 1980, 1981, and 1982. Revenue Canada, acting pursuant to the 1942 Convention, requested in January 1984 that the IRS obtain and provide bank records necessary to the determination of respondents' Canadian tax liabilities for the years in question. Pet. App. 2a.

Thomas J. Clancy, IRS Director of Foreign Operations, was at that time the "competent authority" (see art. XIX) for the United States with respect to such tax treaty information requests.[4] Director Clancy determined that the Canadian requests for information were within the scope of the treaty and that it was appropriate for the United States to honor the requests. Accordingly, on April 2, 1984, the IRS served on Northwestern Commercial Bank administrative summonses (see J.A. 21) for the requested information . Pet. App. 2a-3a.

3. Pursuant to Section 7609(a) of the Code, respondents received notice of the summonses, and they directed the bank not to comply. Respondents then each invoked their rights under Section 7609(b)(2) by petitioning the

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in this case (see 1 Tax Treaties (CCH) ¶ 1301 (1984)). Article XXVII of the new Convention (¶ 1317k), effective with respect to taxes for taxable years beginning on or after January 1, 1985, contains language relating to exchange of information that is essentially indistinguishable from the language contained in Articles XIX and XXI of the 1942 Convention.

[4] The "competent authority" is defined by the protocol accompanying the 1942 Convention as "the Commissioner and the Minister and their duly authorized representatives." 1 Tax Treaties (CCH) ¶ 1233 (1984).

United States District Court for the Western District of Washington to quash the summonses. Respondents raised three claims: (1) the summonses were not issued for lawful purposes; (2) the summonses did not seek information relevant to any inquiry concerning an internal revenue tax of the United States; and (3) the information sought could be obtained directly by Revenue Canada under Canadian law. See J.A. 18-20.

The United States filed oppositions to the petitions to quash, together with motions for summary enforcement, and supported those filings with affidavits from Director Clancy, the "competent authority" (see J.A. 22-29). Director Clancy declared that he had decided to honor the Canadian requests and to issue the summonses because he had concluded that: (1) the requested information may be relevant in determining respondents' tax liability; (2) the same type of information can be obtained by Canadian tax authorities under Canadian law; and (3) the information requested was not already in the possession of the IRS. Director Clancy also declared that Revenue Canada had requested the information to determine the correct tax liabilities of respondents pursuant to a "criminal investigation, preliminary stage" and that he had determined that Revenue Canada's requests were within the scope of the treaty. Pet. App. 2a-3a; J.A. 27-29.

A magistrate held a consolidated hearing on the two petitions to quash and recommended that the district court enforce both of the summonses (Pet. App. 27a-33a, 36a-42a). Over respondents' objections to the magistrate's recommendations, the district court ordered the bank to comply with the summonses (*id.* at 25a-26a, 34a-35a).

4. The enforcement orders were stayed pending appeal, and the court of appeals consolidated the cases and reversed by a 2-1 vote (Pet. App. 1a-21a). The court held that the affidavits submitted did not sufficiently demonstrate that the summonses were issued in "good faith" as

required under United States law (see, *e.g.*, *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964)), because the affidavits did not state that the Canadian investigation had not reached a stage analogous to a referral to the Justice Department for a United States tax investigation (Pet. App. 8a-14a). Accordingly, the court ruled that the treaty did not require that the summonses be enforced because of a failure to satisfy the condition that the information sought be information that "the Commissioner is entitled to obtain under the revenue laws of the United States of America" (art. XXI).

The court of appeals characterized the government as arguing that "the good faith doctrine's requirement of a legitimate purpose should not apply to summonses issued at the request of a treaty partner" (Pet. App. 10a). It rejected that view, stating that "the good faith doctrine applies to summonses issued under the treaty" (*id.* at 11a). Specifically, the court stated that one of the elements of good faith for domestic summonses is the prohibition against issuing summonses once the IRS has made a referral to the Justice Department for criminal prosecution. See I.R.C. § 7602(c). The court held that an analogous requirement must be applied to summonses issued at the request of a treaty partner, *i.e.*, that such a summons should not be enforced if the foreign tax investigation "has progressed to a stage analogous to a Justice Department referral" (Pet. App. 11a-12a).

The court acknowledged that the imposition of such an analogous requirement for treaty summonses had been rejected by the Second Circuit in *United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d 47, 49-53 (1983). See Pet. App. 10a-11a. The Second Circuit had held that, in light of the significant differences between the U.S. and foreign legal systems, the legitimate purpose inquiry for treaty summonses should not necessarily apply to the foreign country all of the details of that standard that

apply to the IRS in domestic cases. In particular, the Second Circuit explained that the policy considerations that underlie the prohibition against post-referral summonses—namely, concern about infringing on the role of grand juries and about expanding discovery powers in criminal prosecutions—simply have no relevance to a Canadian investigation of a Canadian citizen with respect to his Canadian tax liabilities. 703 F.2d at 52. The court below did not address these points. It merely stated that it "decline[d] * * * to adopt *Manufacturers & Traders Trust Co.*," noting that the statutory codification of the prohibition on post-referral summonses had eliminated the need to delve into the "institutional good faith" of a foreign government (Pet. App. 11a).[5]

The court of appeals then concluded that the good faith doctrine that it found applicable to treaty summonses had not been satisfied, *i.e.*, the IRS had not shown that the Canadian request for information was made in "good faith." Specifically, the court held that, "in order to establish its prima facie case by affidavit, the IRS must make an affirmative statement that the investigation has not reached a stage analogous to a Justice Department referral" (Pet. App. 13a). The court stated that such a rule was preferable to placing the burden of proof on the taxpayer because the IRS was in the best position to "consult with Canada's competent authority" and "to have greater familiarity with Canadian administrative procedures" (*ibid.*). The court concluded that "it was clear error [for the district court] to find that the affidavits made a prima facie showing of legitimate purpose" (*id.* at 14a).

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[5] The summons at issue in *Manufacturers* had been issued prior to the effective date of the TEFRA amendments, and therefore the majority opinion in *LaSalle Nat'l Bank* was still the law (see note 2, *supra*).

Judge Wright dissented (Pet. App. 17a-21a). He stated that Director Clancy's affidavit had made a prima facie showing of good faith that was not refuted by respondents. The dissent criticized the majority for "creat[ing] an additional requirement for the good faith showing," namely, the requirement that the IRS affirmatively state that the foreign criminal investigation has not reached a stage analogous to a Justice Department referral (*id.* at 18a-20a). The dissent also stated that the majority had not offered "sound bases" for rejecting *Manufacturers* (*id.* at 19a). It concluded that the decision below "creates an unnecessary intercircuit split, imposes new burdens on the competent authority and meddles unnecessarily in Canadian internal affairs" (*id.* at 17a).[6]

SUMMARY OF ARGUMENT

A. The role of the court in a summons enforcement proceeding is limited to determining whether the IRS issued the summons in "good faith," as delineated in

[6] The dissent also criticized (Pet. App. 20a-21a) the majority's refusal to consider certain supplemental legal materials submitted by the government. In response to questions raised for the first time at oral argument concerning the burden of proof on the referral issue, the government had submitted supplemental case law showing that the taxpayer bears the burden of proof on this issue. The government also had submitted certain foreign law materials showing that Revenue Canada had not yet made the equivalent of a Justice Department referral in this case. The majority refused to consider these materials because the government had failed to seek leave of the court before filing the domestic law materials (see Fed. R. App. P. 28(c) and (j)) and because the court believed that, in fairness to respondents, the foreign law materials should have been submitted no later than in the appellate brief (Pet. App. 14a-15a). The dissent replied that the procedure followed by the government had been used successfully in other treaty interpretation cases, citing *Coplin* v. *United States*, 761 F.2d 688, 691 (Fed. Cir. 1985), aff'd, 479 U.S. 27 (1986), and that respondents could have been afforded an opportunity to respond to any points raised by the foreign law materials.

United States v. *Powell*, 379 U.S. 48, 57-58 (1964). Essentially, this means that the IRS must show that the summons has been issued for a legitimate purpose authorized by Congress. If that showing is made, the summons must be enforced unless the party opposing enforcement rebuts the IRS's showing by demonstrating an improper purpose. When the IRS issues a summons in order to comply with the United States' obligations under the exchange of information provisions of a treaty, it is plainly acting for a legitimate purpose. Accordingly, a summons issued by the IRS based on the competent authority's determination that it is appropriate to honor a treaty partner's request for the summoned information should be enforced in the absence of a showing that the IRS acted with an improper purpose.

The court of appeals seriously erred in holding that a district court is empowered to deny enforcement of a treaty summons on the basis of the court's own conclusion about the good faith of the treaty partner. The treaty establishes the competent authority as the conclusive arbiter of whether the treaty partner's information request is valid under the treaty. For the most part, administration of the treaty is handled exclusively by the respective competent authorities. In particular, when a request for information is made by a treaty partner, the competent authority acts upon it alone; if he determines that the request should be honored, he furnishes the relevant information that is at his disposal to the treaty partner—without involving any other government entity in the process. Nothing in the treaty in any way suggests that the competent authority's determination should be any less conclusive when the IRS must issue a summons in order to obtain the requested information. Hence, the competent authority's determination that a valid request has been made under the treaty is binding on the court in the summons enforcement proceeding; the court can inquire only into whether that determination, and the consequent decision to issue

a summons, were made in good faith. This requirement of deference to the Executive on the administration of tax treaty exchange of information provisions is not unusual; it accords with the manner in which the final responsibility for decisionmaking on particular matters implicating international relations, such as the motivation for an extradition request, is commonly placed in the hands of an officer of the Executive.

Indeed, the inquiry contemplated by the court of appeals exceeds the limited scope authorized by *Powell* because it extends far beyond the question of the good faith of the IRS—the entity that issued and is seeking enforcement of the summons. An inquiry by the court into the circumstances surrounding the treaty partner's request is an improper redetermination of the merits of the IRS's decision to issue the summons, rather than the limited inquiry into its good faith in doing so that *Powell* prescribes. Just like inquiring into the wisdom of the IRS's decision to investigate and therefore issue a domestic summons, second-guessing the correctness of the IRS's decision to honor a treaty request exceeds the limited good faith inquiry that a court enforcing a summons is empowered to make. Because there were no grounds in this case for doubting the IRS's good faith in issuing the summonses, they should have been enforced.

B. There is no basis for the substantive limitation that the court of appeals placed upon the enforcement of a treaty summons—namely, that the foreign tax investigation not have reached a stage analogous to a Justice Department referral. The language of the 1942 Convention cited by the court, limiting the Commissioner's obligation to such information as he "is entitled to obtain under the revenue laws of the United States" (art. XXI), simply establishes that the United States does not violate the treaty when it fails to obtain the requested information because it lacks the power to do so under domestic law—

for example, if the requested documents are privileged. That language does not suggest an intent to impose any further limitations, such as ones derived by analogy to restrictions that apply to the IRS in issuing non-treaty summonses. In particular, the treaty specifies the purposes for which an information request may be made; a referral requirement that essentially would limit those explicitly-stated purposes should not lightly be implied. Moreover, the decision of the court of appeals is contrary to the understanding of both of the parties to the treaty, and the "foreign referral" restriction it imposes would impede the accomplishment of the treaty's primary goal—the exchange of information in order to prevent fiscal evasion. Established canons of treaty construction, therefore, militate against interpreting the 1942 Convention to contain such an implied restriction.

Nor can the court of appeals' decision be defended on the ground that a "foreign referral" restriction arises directly under United States law. Section 7602(c), by its terms, bars the use of the summons power only after there has been a referral for prosecution to the *United States* Department of Justice. There is no basis for reading into that provision a prohibition on the issuance of a treaty summons just because the foreign investigation "has progressed to a stage analogous to a Justice Department referral" (Pet. App. 11a-12a). Both the legislative history of Section 7602(c) and the earlier decision of this Court in *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298, 312-313 (1978), make clear that the only reason for the referral restriction is to prevent use of the summons power "to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation" (*id.* at 312). Plainly, these purely domestic policy considerations are not advanced in the slightest by imposing a "foreign referral" requirement in treaty summons cases, and there is

no reason why Congress should have wanted to impose such a requirement, especially since none of our treaty partners still use the grand jury.

Moreover, the interpretation of the court of appeals is inimical to other important government interests. It would cause United States courts, in some cases, to hamper a foreign country's tax investigation of its own citizens by denying information to that country – without advancing any policy interest of either the United States or the foreign country. Such action likely would not be looked upon kindly by our treaty partner and could lead it to be less cooperative in dealing with requests for information by the United States. The court's holding also runs contrary to the general policy of the treaty to promote the exchange of information.

Even in cases where the court does not ultimately refuse to enforce the summons, the "foreign referral" restriction would undermine the "summary" nature of enforcement proceedings and unnecessarily delay the foreign investigation. By imposing such a restriction, the court of appeals would inject a new and complex issue into summons enforcement proceedings that would provide the party opposing enforcement with an effective means of delaying the receipt of information by the treaty partner. Indeed, the vast differences between our legal system and governmental structure and those of other countries make the task of determining whether there has occurred an analogue to a Justice Department referral not only time-consuming, but virtually impossible in many cases. It is highly implausible that Congress intended to invite an inquiry that would generate such delays when it enacted Section 7602(c), since the primary motivation for that legislation was to eliminate the need for a difficult inquiry into whether the IRS had made an institutional decision to abandon a civil investigation (see *United States* v. *LaSalle Nat'l Bank*, *supra*), which was unnecessarily prolonging summons enforcement proceedings.

C. The court of appeals also erred in placing the burden of proof on the IRS to show the absence of a "foreign referral." Contrary to the court of appeals' suggestion (Pet. App. 13a), both *LaSalle Nat'l Bank* and the legislative history of Section 7602(c) clearly contemplate that, in a domestic summons case, the existence of a Justice Department referral must be shown by the taxpayer in the "rebuttal" stage of the enforcement proceeding. This rule contributes to the expeditious disposition of summons enforcement disputes and should be applied in both domestic and treaty summons cases. Accordingly, even if (contrary to our contention) there were a "foreign referral" restriction, the IRS should not bear the burden of proving the absence of such a referral.

ARGUMENT

AN IRS SUMMONS ISSUED IN FURTHERANCE OF THE UNITED STATES' OBLIGATION TO SATISFY A TREATY PARTNER'S REQUEST FOR INFORMATION DOES NOT HAVE TO BE SUPPORTED BY A DECLARATION THAT THE FOREIGN TAX INVESTIGATION HAS NOT REACHED A STAGE ANALOGOUS TO THE REFERRAL OF A DOMESTIC TAX INVESTIGATION TO THE JUSTICE DEPARTMENT FOR CRIMINAL PROSECUTION

The United States has entered into numerous tax treaties with other nations that provide for the treaty partners to assist each other's tax investigations by means of reciprocal exchanges of information. The decision of the court of appeals severely restricts the ability of the IRS to use its summons power to meet those treaty obligations. The court has imposed upon the IRS a burdensome requirement that has no basis either in the treaty or in any statute, namely, that the IRS declare that the foreign tax investigation has not reached a stage analogous to an IRS

referral to the Justice Department for criminal prosecution. This holding cannot be squared with the court's limited role in summons enforcement proceedings or with the scope of the treaty obligations of the United States. The court's role in a summons enforcement proceeding is limited to determining whether the IRS is seeking the information in good faith for a legitimate purpose; the court has no warrant to conduct an inquiry into the merits or the status of the foreign tax investigation. Rather, the treaty confers upon the Commissioner of Internal Revenue or his delegate the responsibility of conclusively determining whether the treaty partner's request is one that should be honored as falling within the terms of the treaty, and it is the Commissioner's "good faith" that should be the subject of the court's inquiry.

Moreover, the substantive requirement imposed by the court of appeals on the foreign country—namely, that its investigation not have reached a stage analogous to a Justice Department referral—is fundamentally inappropriate. That requirement for domestic summonses is grounded entirely in policies peculiar to the legal system of the United States and that may well be completely irrelevant to practices in the treaty partner's jurisdiction. Indeed, in most countries the inquiry contemplated by the court of appeals would likely be meaningless because their legal systems and governmental organizations are quite different from that of the United States. In short, the holding of the court of appeals has no legal basis, and it would seriously impair cooperation with our tax treaty partners and impede the flow of information under our treaties, without advancing any statutory policy.

A. The IRS's Good Faith Determination that a Treaty Partner's Request for Information Should be Honored under the Terms of a Treaty Constitutes a Legitimate Purpose for the Issuance of a Summons that Justifies its Enforcement Without Any Independent Inquiry by the Court into the Nature of the Treaty Partner's Request

1. *A Court is Obliged to Enforce an IRS Summons that is Issued for a Legitimate Purpose and Otherwise Meets the Criteria of "Good Faith"*

The summons power of the IRS is a broad one, and the role of the courts in an action brought to enforce a summons is limited to determining whether the IRS is abusing its power by attempting to summon documents in circumstances to which Congress did not intend the summons power to extend. The basic inquiry into whether the summons was issued in "good faith" was delineated by this Court in the seminal case of *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964): The Commissioner "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." See also, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 321 (1985); *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 813 n.10 (1984). As the Court stated more succinctly on another occasion, the summons "must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose" (*United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975)). The party opposing enforcement may rebut the Commissioner's good faith showing by demonstrating that the IRS issued the summons for an improper purpose, "such as to harass the taxpayer or to put pressure on him to settle a collateral dispute" (*United States* v. *Powell*, 379

U.S. at 58). Failing such a rebuttal, however, as long as the court determines that the summons was issued to obtain information for a legitimate purpose and that the good faith threshold is otherwise satisfied, then the court is obligated to enforce the summons.

The enactment of Section 7602(c), on which the court of appeals relied to deny enforcement of the summonses in this case, did not alter the basic framework of the inquiry described in *Powell*. This Court's decision in *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978), which led to the enactment of Section 7206(c), merely addressed the question whether a summons issued under a particular set of circumstances should be regarded as issued for a "legitimate purpose," *i.e.*, one for which Congress has made the summons power available. The premise of the Court's decision was the assumption that Congress did not intend to authorize the use of a summons solely for the purpose of unearthing evidence of criminal conduct. Accordingly, the Court held that a summons issued after a case had been referred to the Justice Department for criminal prosecution should be regarded as having been issued for an improper purpose. 437 U.S. at 311-313. The Court explained that this limitation on the summons power is designed to safeguard two policy interests—namely, the desire not "to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation" (*id.* at 312). The dissenting Justices agreed with this aspect of the majority's opinion, noting that the " 'only rationale' " for this limitation on the summons power was the conclusion that " 'Congress could not have intended the statute [granting summons authority] to trench on the power of the grand jury or to broaden the Government's right to discovery in a criminal case' " (*id.* at 321 (Stewart, J., dissenting), quoting *United States* v. *Morgan Guaranty Trust Co.*, 572 F.2d 36, 41-42 (2d Cir.), cert. denied, 439

U.S. 822 (1978)). The Court divided on the other aspect of the majority's opinion—its holding that a summons also is issued for an improper purpose if the IRS has "abandon[ed] in an institutional sense * * * the pursuit of civil tax determination or collection" (437 U.S. at 318).

When Congress responded to the decision in *LaSalle Nat'l Bank* by enacting Section 7602(c) to codify the dissenting Justices' view, it similarly did not depart from the general framework of the *Powell* "good faith" inquiry. Indeed, the legislative history reflects that Congress specifically reaffirmed the validity of that inquiry. See 1 S. Rep. 97-494, 97th Cong., 2d Sess. 285, 286 (1982). Congress expressly provided in Section 7602(b) that one of the purposes for which the IRS may issue a summons is to "inquir[e] into any offense connected with the administration or enforcement of the internal revenue laws." But, like the Court, Congress concluded that issuance of a summons after making a referral to the Justice Department would go beyond the purposes for which the summons power had been bestowed upon the IRS; on this point, Congress noted that it did not wish "to broaden the Justice Department's right of criminal discovery or to infringe on the role of the grand jury as a principal tool of criminal prosecution" (1 S. Rep. 97-494, *supra*, at 286). Thus, the enactment of Section 7602(c) did not change the general inquiry for the court in a summons enforcement proceeding from that set forth in *Powell*—whether the IRS issued the summons in good faith in furtherance of a legitimate purpose authorized by Congress. Section 7602(c) does no more than to resolve that question in one specific factual context by providing that a summons should be regarded as issued for an improper purpose if the IRS has already referred the investigation to the Justice Department for criminal prosecution.

2. ***An IRS Summons is for a Legitimate Purpose when it is Issued Pursuant to a Determination by the Competent Authority that it is Appropriate to Honor a Treaty Partner's Request for the Information Sought by the Summons***

a. The 1942 Convention embodies a cooperative effort between the United States and Canada to assist each other in combatting tax evasion. The procedural framework for the exchange of information under the treaty contemplates direct cooperation between the executive agencies that are responsible for the collection of taxes in each country, through designated "competent authorities." For the most part, the Convention contemplates that the competent authorities will implement these provisions autonomously. Thus, the competent authorities are empowered to prescribe regulations to govern information exchanges and to communicate directly with each other for the purpose of administering the Convention (art. XVIII, 56 Stat. 1405). The competent authorities are also required to supply each other on a regular basis with certain specified information concerning income received by residents of one country from sources in the other country (art. XX, 56 Stat. 1405).

Most significantly, the treaty directs the competent authorities to act upon requests for information from the treaty partner, and to supply the requested information when the competent authority concludes that the request is one that should be honored as falling within the treaty, *i.e.*, a bona fide request for information to be used in the determination of tax liability. Article XIX provides that each country agrees to supply to the other "the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws in so far as such information may be of use * * * in the assessment of the taxes to which this Convention relates." Article XIX further provides that this information "may be

exchanged directly between the competent authorities of the two contracting States." Thus, in the case of information at the disposal of the competent authority, it is clear that the treaty contemplates that the competent authority will make a dispositive determination whether the treaty partner's request is one that should be honored. If he concludes that the request is valid, he furnishes the information directly to the treaty partner without involving any other government entity in the process.

There is one aspect of the information exchange provisions, however, that may require judicial action. When the information requested is not at the disposal of the competent authority, the 1942 Convention clearly contemplates that the IRS will issue summonses on some occasions for the sole purpose of obtaining information for the benefit of a treaty partner; as with any other summons, the IRS must seek to enforce that summons in court if the person to whom the summons is directed fails to comply. Article XXI of the Convention states that, when requested by Canada in connection with the determination of a taxpayer's Canadian tax liability, "the Commissioner may * * * furnish the [Canadian] Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America." And Article XIX also obligates each treaty partner to furnish to the other information "which its competent authorities * * * are in a position to obtain under its revenue laws." Thus, when Canada requests information under the treaty that is not in the IRS's possession, and the competent authority determines that the request is one that should be honored under the terms of the treaty, the IRS will act in accordance with the United States' treaty obligations by issuing a summons for that information. Such a treaty summons, even though the information it seeks is intended to be used, not by the IRS, but

by Canada to aid in the investigation of Canadian tax liability, is issued for a "legitimate purpose" authorized by Congress because it is designed to satisfy the United States' obligations under a tax treaty with a foreign nation. See generally *United States* v. *A.L. Burbank & Co.*, 525 F.2d 9 (2d Cir. 1975), cert. denied, 426 U.S. 934 (1976).

When asked to enforce such a summons, the district court's authority, as in the case of a non-treaty summons, is limited to determining whether the summons is issued in "good faith" within the general framework set forth in *Powell*. And, because it is the IRS that has issued the summons and is attempting to invoke the power of the court to enforce the summons, it is the good faith *of the IRS*, not that of the treaty partner, that is the subject of the court's inquiry. As discussed earlier (see pages 15-17, *supra*), the primary focus of the good faith inquiry is whether the summons was issued for a legitimate purpose. That question is answered by the determination of the competent authority that the request for information under the treaty is one that should be honored by the United States. As long as that determination is made by the IRS in good faith, and not for an improper purpose, there is no basis for the district court to refuse to enforce the summons on the ground that it was not issued for a legitimate purpose.[7]

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[7] If a showing were made in the district court that the competent authority did not act in good faith in making the determination, that could provide a basis for declining to enforce the summons. The court could conclude that the summons was issued, not for the legitimate purpose of complying with the United States' obligation to its treaty partner to satisfy an appropriate request for information under the treaty, but for some improper purpose, "such as to harass the taxpayer or to put pressure on him to settle a collateral dispute" (*United States* v. *Powell*, 379 U.S. at 58). The basis for the court's refusal, however, would be that *the IRS* did not act in good faith in issuing the summons; the court's decision would not be based upon any inquiry into the decisionmaking of the treaty partner.

And if, as was concededly the case here, the other elements of "good faith" under *Powell* are satisfied—that the summoned information is relevant to the legitimate purpose, that the information is not already in the IRS's possession, and that all the administrative steps have been followed—then the summons should be enforced.

The court of appeals' holding that the district court's inquiry into "legitimate purpose" should focus not on the IRS, but rather on the motivations of the foreign tax authorities who made the request under the treaty, is erroneous. In a proceeding to enforce a treaty summons issued by the IRS, the district court should not review de novo the correctness of the IRS's determination that the foreign request is one that is appropriately honored under the treaty, *i.e.*, that the treaty partner's request for information is bona fide and for a valid purpose. As we have seen, the treaty unmistakably contemplates that that determination will be made conclusively by the competent authority when the information is at the disposal of the IRS; nothing in the treaty provides any basis for finding that the competent authority's determination should be any less conclusive when the IRS must issue a summons in order to obtain the requested information. The court of appeals' approach does not respect this aspect of the treaty; moreover, it mistakenly focuses the court's inquiry directly on the "good faith" of the country invoking its treaty rights instead of focusing on the party requesting enforcement of the summons. In so doing, it departs from well-recognized practices in the areas of both summons enforcement and compliance with foreign treaty obligations, and it threatens to inject the judiciary unnecessarily into sensitive areas of foreign relations that should be left to the other branches of government.

b. The necessary corollary to the fact that the district court's inquiry in a summons enforcement proceeding is limited to determining "good faith" is that the court

should not inquire into the merits of some questions that may well be relevant to the administrative decision whether to issue the summons in the first place. For example, the issuance of a summons in a domestic investigation reflects an administrative decision based on many factors that, taken together, have led the IRS to conclude that there is sufficient reason to believe that an investigation may be sufficiently fruitful that the expenditure of resources is justified. Clearly, however, the district court has no authority to second-guess that administrative judgment, and the summons enforcement proceeding does not encompass any inquiry into the strength of the IRS's suspicions that trigger the investigation.

This is true even if the court's inquiry into the wisdom of conducting an investigation could have a fairly narrow focus. For example, in *United States* v. *Powell, supra*, the investigation for which the summoned documents were sought was directed at tax years for which the statute of limitations had expired; therefore, the taxpayer's tax liability would be affected only if he could be proved to have committed fraud (see I.R.C. § 6501(c)(1)). Moreover, because the summons sought a second inspection of records, it could be issued only upon notice to the taxpayer that the Commissioner had found that the additional inspection was "necessary" (I.R.C. § 7605(b)). Nevertheless, the Court held that the summons enforcement proceeding was limited to determining whether the summons had been issued in good faith, and an argument that the Commissioner erred in finding that the additional inspection was "necessary" or that the IRS lacked a sufficient basis to believe that fraud could be proved was not an " 'appropriate ground' " (379 U.S. at 58, quoting *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964)) for challenging enforcement of the summons. 379 U.S. at 57-58.

Under *Powell* and subsequent cases, it is clear that taxpayers may not go behind the face of the summons to challenge the decision of the Commissioner to conduct an investigation. The court asked to enforce a summons should inquire whether the decision to issue the summons is *procedurally* sound—in the sense that the IRS must show that "the administrative steps required by the Code have been followed" (379 U.S. at 58)—but it should not question the *merits* of that decision. For example, if a taxpayer seeks to demonstrate in a summons enforcement proceeding the inaccuracy of the information on which the Commissioner relied in deciding to issue the summons, the court is bound to reject the proffer as irrelevant and to enforce the summons.[8] Similarly, the Commissioner's determination that a treaty partner's request for information should be honored under the treaty is not properly subject to judicial reexamination (except for consideration of the IRS's good faith in making that determination), and

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[8] The mechanism for enforcing a "John Doe summons" also highlights the limitations of the court's role in a summons enforcement proceeding. Under Section 7609(f), the government can issue such a summons—for records pertaining to an unidentified third party—only after obtaining a court order. That order is issued by a district court in an ex parte proceeding on the basis of government affidavits that demonstrate that the criteria set forth in Section 7609(f) are satisfied. If such a summons is issued and the summoned party refuses to comply, the IRS brings an ordinary summons enforcement suit. In that situation, the courts have rejected efforts by the party opposing enforcement to mount a collateral challenge to the prior ex parte decision authorizing the issuance of the summons. See, *e.g.*, *United States* v. *John G. Mutschler & Assocs.*, 734 F.2d 363, 366-367 (8th Cir. 1984); *Agricultural Asset Management Co.* v. *United States*, 688 F.2d 144, 148-149 (2d Cir. 1982). The courts have explained that the decision to issue the summons cannot be reexamined, even if there is evidence that it was flawed; the district court's role in the enforcement proceeding is limited to conducting the "good faith" inquiry established by *Powell*.

the court in the summons enforcement proceeding should not entertain any challenge to the summons that is based on an independent examination of the treaty partner's request.

c. Preclusion of second-guessing by the district court of the IRS's determination that it is appropriate to issue a summons – beyond the traditional good faith inquiry – is particularly important in the treaty summons context because of the sensitive foreign relations considerations that are implicated in responding to a treaty request. See *INS* v. *Abudu*, No. 86-1128 (Mar. 1, 1988), slip op. 15-16. The conduct of international relations is primarily committed to the Executive Branch, in part because of the importance that the United States speak in such delicate matters with one voice. See, *e.g.*, *Haig* v. *Agee*, 453 U.S. 280, 293-294 (1981); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936). The negotiation of treaties is a major feature of our relations with foreign nations, and that task is exclusively committed to the President (*id.* at 319). Moreover, the fulfillment of responsibilities under treaties can have a profound effect on our relations with other nations, particularly when the issue is whether the United States will recognize an obligation to comply with a treaty partner's request. A finding by a United States court that a treaty request should be refused because the treaty partner did not make the request in "good faith" may well be viewed by our treaty partner as a "serious insult" (*Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 432 (1964)) that will "embarrass" the executive officials in both countries who are primarily responsible for maintaining amicable relations between the countries (see *United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d 47, 53 (2d Cir. 1983)). And, specifically, such disruption of the treaty's implementation could seriously jeopardize the ability of the United States

to persuade its treaty partner to honor that country's reciprocal obligations under the treaty.

In order to minimize such pitfalls, decisionmaking on particular matters implicating international relations is commonly placed in the hands of an officer of the Executive whose exercise of his authority for that purpose is not subject to review by the judiciary. See, *e.g.*, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713-715 (1893); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892). In part, this is because the courts are ill-suited (as well as unauthorized) to make foreign relations judgments. Their focus naturally is on the facts of the case before them and the particular parties involved; the courts are not equipped like the Executive Branch to take into account the myriad interests that must be balanced in pursuing a coherent foreign policy. Cf. *Wang* v. *INS*, 622 F.2d 1341, 1351 (9th Cir. 1980) (Sneed, J. dissenting) (discussing discretionary decisions concerning deportation of aliens), rev'd, 450 U.S. 139 (1981).[9] These concerns apply as well to decisionmaking in the implementation of a treaty, including determination of the appropriateness and validity of another country's request for action under the treaty, and they similarly indicate the need for insulating such decisions by the Executive Branch from second-guessing by the courts. See *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U.S. 470, 489 (1941).

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[9] Treaties are generally designed to deal with relationships between nations, not to confer rights upon individuals; indeed, treaty provisions frequently cannot be invoked for the enforcement of private rights. See, *e.g.*, *United States* v. *Davis*, 767 F.2d 1025, 1030 (2d Cir. 1985); *Dreyfus* v. *United States*, 534 F.2d 24, 29-30 (2d Cir.), cert. denied, 429 U.S. 835 (1976); Brownlie, *The Place of the Individual in International Law*, 50 Va. L. Rev. 435, 440 (1964).

The manner in which the judiciary's role is often limited in matters involving relations between sovereigns is illustrated in several contexts. The ultimate decision to honor a foreign extradition request is committed to the Executive Branch. Accordingly, in a habeas corpus proceeding challenging extradition, the courts do not "inquire into the procedures which await the relator upon extradition" (*Gallina* v. *Fraser*, 278 F.2d 77, 78 (2d Cir.), cert. denied, 364 U.S. 851 (1960)). See also *Demjanjuk* v. *Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986). Similarly, the courts will not probe the motivations behind a treaty partner's extradition request, for such evaluations "so clearly implicate the conduct of this country's foreign relations as to be a matter better left to the Executive's discretion" (*Eain* v. *Wilkes*, 641 F.2d 504, 516 (7th Cir.), cert. denied, 454 U.S. 894 (1981)). See also 641 F.2d at 518; *Garcia-Guillern* v. *United States*, 450 F.2d 1189, 1192 (5th Cir. 1971), cert. denied, 405 U.S. 989 (1972). See generally Note, *Executive Discretion in Extradition*, 62 Colum. L. Rev. 1313 (1962).

In the analogous situation of extradition from one state to another, once the governor of the asylum state has granted extradition, the courts in the asylum state lack the power to look behind the determination by the judicial officer in the demanding state that there is probable cause to believe that the fugitive has committed a crime. *California* v. *Superior Court*, No. 86-381 (June 9, 1987); *Michigan* v. *Doran*, 439 U.S. 282, 286-290 (1978). And the Executive Branch's determination to allow a claim by a foreign nation of immunity from suit is regarded as a "conclusive determination by the political arm of the Government"; it is not subject to reexamination by the courts. *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943). See also *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. at 427-437; *Compania Espanola de Navigacion Maritima, S.A.* v. *The Navemar*, 303 U.S. 68, 74 (1938). Thus, the

approach taken in the tax treaty—making the competent authority the conclusive decisionmaker on the question whether a request for information should be honored under the treaty—is fully consonant with the traditional approach to determinations that can have major implications upon foreign relations.

In sum, the court of appeals erred in holding that the district court, in a proceeding to enforce a treaty summons, should embark on an inquiry into the merits of the foreign tax investigation or the good faith of the foreign country. Established principles of summons enforcement law indicate that the court's inquiry should be limited to the good faith of the entity issuing the summons, *i.e.*, the IRS. Conversely, the strength of the reasons for the IRS's good faith decision to issue the summons—here, its conclusion that the summonses were necessary to comply with a valid treaty request—is not an appropriate ground for inquiry. More particularly, the treaty itself does not contemplate that the district court shall be the final arbiter of the validity of a foreign government's request for information under the treaty; on the contrary, the treaty confers upon the "competent authority" the responsibility to receive and weigh the request and decide whether it is appropriate for the United States to obtain the requested information. This allocation of responsibility furthers the sound administration of foreign policy. For the district court to second-guess the competent authority's determination and take upon itself the power to declare that a foreign country did not act in good faith in requesting information under the treaty would inject the court into delicate matters of international relations that are traditionally the province of the Executive and are beyond the scope of the court's expertise. The competent authority's determination that the foreign country's request for the summoned information should be honored under the

treaty provides a legitimate purpose for the IRS's issuance of the summons that justifies its enforcement.[10]

3. *The District Court Correctly Enforced the Summonses Based upon the Showing Made by the Competent Authority in this Case*

When the correct principles governing the scope of a proceeding to enforce a treaty summons are applied, it is clear that the district court in this case correctly enforced the summonses. The affidavits submitted by the competent authority here (see J.A. 27-29) stated that he had decided to honor the Canadian treaty requests because the requested information may be relevant in determining respondents' tax liability and the same type of information can be obtained by Canadian tax authorities under Canadian law. The affidavits further stated that the information requested was not already in the hands of the IRS, and therefore the issuance of summonses was necessary to obtain that information. Thus, the affidavits demonstrated that the summonses were issued by the IRS for a legitimate purpose—to comply with what the competent authority found to be a valid treaty request—and that the other elements of the *Powell* good faith inquiry had been met.

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[10] Some of the problems inherent in allowing the enforcing court to investigate the good faith of the treaty partner's request are illustrated by a recent decision in another treaty summons case (*Kerry F.B. Packer* v. *United States*, Civil No. C2-87-1285 (S.D. Ohio July 6, 1988)). The IRS issued a summons to obtain information requested by the Australian Tax Commission pursuant to our tax treaty with Australia. The court erroneously refused to enforce the summons, pending an evidentiary hearing into "whether Australia's request for the records in question was in fact accompanied by a proper or legitimate purpose" (slip op. 4). To that end, the proceedings were held in abeyance to allow the taxpayer to seek discovery from an Australian tax official by means of a letter rogatory.

Respondents did not rebut this showing that the IRS acted in good faith in issuing the summonses; indeed, respondents did not even allege that the summonses were issued for an improper purpose, such as to harass them or to put pressure on them to settle a collateral dispute with the IRS. Moreover, there certainly was no reason to doubt on its face the IRS's determination that Canada's request for information was a valid one under the treaty. The information sought, the bank's records of its transactions with certain customers, plainly was information that "the Commissioner is entitled to obtain under the revenue laws of the United States" (art. XXI). Indeed, the legislative history of the 1942 Convention shows that the United States and Canada specifically contemplated the issuance of summonses for bank records at the request of the treaty partner. See 88 Cong. Rec. 4714 (1942).[11] The summoned information was not privileged, nor was there any other basis for the bank to withhold it in the face of valid summonses. In short, there was no basis on which the court

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[11] The following colloquy took place on the floor of the Senate during the debate on ratification of the 1942 Convention (88 Cong. Rec. 4714 (1942)):

> Mr. Taft. In other words, if an American citizen were using a Canadian bank deposit to evade income taxation, I think the [treaty] would permit the United States Government to ask the Canadian Government to obtain information from its own bank and furnish it to this Government in connection with the enforcement of our internal-revenue laws.
>
> Mr. George. It does provide for exchange of information, as the Senator from Ohio points out.

See also *United States* v. *A.L. Burbank & Co.*, 525 F.2d at 17 n.7. The same view is expressed in a letter from the Acting Secretary of State that accompanied the Convention when it was presented to the Senate for ratification. S. Exec. Doc. B, 77th Cong., 2d Sess. 1, 2, 4-5 (1942), *reprinted in* Joint Comm. on Int. Rev. Tax., 77th Cong., 2d Sess., 1 *Legislative History of United States Tax Conventions* 445, 448-449 (1962).

could have concluded that the summonses in this case were an abuse of the summons power, and they should have been enforced.

B. Evidence that a Foreign Tax Investigation has not Reached a Stage Analogous to a Justice Department Referral is not a Prerequisite to Issuance of a Summons to Honor a Treaty Partner's Request for Information

Quite apart from its error in approving judicial reexamination of the competent authority's determination to honor the treaty partner's request for information, the court of appeals also erred in the substantive standard that it applied to the foreign tax investigation in determining whether the treaty summonses were enforceable. The court held that the summonses could not be enforced unless the IRS showed that the treaty partner's investigation had not advanced to a point analogous to a Justice Department referral (Pet. App. 11a-12a), but neither the treaty nor the relevant statute provides any basis for finding such a restriction. Indeed, there is no policy rationale whatever for the imposition of this "foreign referral" restriction. It would, moreover, seriously interfere with the United States' ability to comply expeditiously with its treaty obligations to summon information needed by a treaty partner for a tax investigation. Since the absence of an analogous "foreign referral" simply is nowhere specified as a prerequisite to honoring a treaty partner's request for information, the IRS is not required to inquire into the stage that the foreign investigation has reached before determining either to furnish the treaty partner information already known to the IRS or to issue a treaty summons. It follows, *a fortiori*, that the court cannot refuse to enforce such a summons on the ground that a foreign analogue to a Justice Department referral has, or may have, occurred.

1. The court of appeals appears to have rested its decision on the language in the 1942 Convention that limits the United States' obligation to obtain information for Canada to such information "as the Commissioner is entitled to obtain under the revenue laws of the United States of America" (art. XXI). See Pet. App. 10a-11a. This language establishes that the United States does not violate the treaty when it fails to obtain the requested information because it lacks the power to do so under United States law. For example, information that is protected from being summoned because it is subject to a privilege, such as the attorney-client privilege or the privilege against self-incrimination, or information that could be obtained only through a violation of the Fourth Amendment clearly need not be furnished to Canada under the terms of the treaty. Moreover, we may assume for purposes of argument that the terms of Section 7602(c) might bar enforcement of a treaty summons when there had been in effect an IRS referral to the *United States* Department of Justice with respect to the same taxpayer. But there is no basis for reading the language of the treaty to impose limitations on supplying information to Canada that are not directly contained in United States law, but are derived only by analogy to restrictions that apply to the IRS in issuing non-treaty summonses.

The court of appeals' imputation into the language of the 1942 Convention of a restriction on treaty summonses is particularly inappropriate with respect to the specific restriction involved in this case – the prohibition in Section 7602(c) against the issuance by the IRS of a summons after there has been a referral to the Justice Department for criminal prosecution. That prohibition is essentially a limitation on the purposes for which the IRS can invoke the summons power (though the purpose inquiry is resolved by a bright-line rule based on the stage that the investigation has reached). But there is no basis for applying that restriction to Canada (or to any other treaty partner).

The treaty itself explicitly describes the purposes for which Canada can request information under its provisions – for "use * * * in the assessment of the taxes to which this Convention relates" (art. XIX) or when the Minister deems it necessary to obtain the information "in the determination of the income tax liability of any person under any of the revenue laws of Canada" (art. XXI). Only a distorted interpretation of the treaty would modify and limit these explicit provisions regarding allowable purposes on the basis of a provision that merely declares that the United States is not obligated to furnish information that it lacks the power to obtain.

Fundamental principles regarding the construction of treaties further confirm the error of the court of appeals' interpretation. The role of a court interpreting international agreements is "limited to giving effect to the intent of the Treaty parties" (*Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982)). When a dispute about the meaning of a treaty provision arises, there are several principles of interpretation that have been repeatedly recognized as useful in determining the intent of the parties. A treaty generally is to be "construe[d] * * * liberally to give effect to the purpose which animates it" (*Bacardi Corp.* v. *Domenech*, 311 U.S. 150, 163 (1940)). See also *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, No. 86-1052 (June 15, 1988), slip op. 5; *Factor* v. *Laubenheimer*, 290 U.S. 276, 293-294 (1933); *Nielsen* v. *Johnson*, 279 U.S. 47, 52 (1929); *Rocca* v. *Thompson*, 223 U.S. 317, 331-332 (1912). The practice of the two states under the treaty is considered strong evidence of the correct interpretation. *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 259 (1984); *Factor* v. *Laubenheimer*, 290 U.S. at 294-295; see also *Air France* v. *Saks*, 470 U.S. 392, 404-405 (1985). And the construction of the treaty by the Executive Branch is entitled to "great weight" in assessing the intention of the contracting states.

Sumitomo Shoji America, Inc. v. *Avagliano*, 457 U.S. at 184-185; *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961).

These canons of construction all counsel rejection of the court of appeals' interpretation. The manifest purpose of the treaty provisions involved here is to provide for unfettered exchange of information between the two nations in order to assist the treaty partner's conduct of its tax investigations. This cooperation is designed to serve the treaty's more general goal of "prevent[ing] fiscal evasion" (art. XIX). See *United States* v. *A.L. Burbank & Co.*, 525 F.2d at 13. Plainly, the interpretation of the court of appeals, in imposing an additional (unexpressed) restriction on the enforcement of treaty summonses that will inhibit the flow of relevant information from the United States to Canada, serves to impede and retard the accomplishment of the treaty's general purposes. Therefore, that interpretation should not be adopted in the absence of some compelling evidence that it reflects the intention of the parties. See *Bacardi Corp.* v. *Domenech*, 311 U.S. at 163 ("Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred."); see also *United States* v. *Davis*, 767 F.2d 1025, 1031 (2d Cir. 1985) (stating reluctance "to erect unnecessary procedural obstacles in the path of international judicial assistance"). Moreover, the court of appeals' reading of the treaty is at odds with the interpretation of the executive agency responsible for its negotiation and administration, and it is contrary to the consistent practice of both Canada and the United States in operating under the 1942 Convention. See *United States* v. *Manufacturers & Traders Trust Co.*, *supra*. In sum, the court of appeals' reading of the treaty to include a "foreign referral" restriction, by analogy to Section 7602(c) of the Code, is wholly without foundation.

2. If, as we have shown, a "foreign referral" restriction upon the enforcement of a treaty summons does not arise from the treaty itself, the court of appeals' holding is defensible only if such a restriction arises directly under United States law. But there simply is no such restriction in the Code. Section 7602(c), by its terms, does not impose a "foreign referral" restriction. Section 7602(c)(1) expressly limits the IRS's authority to issue a summons with respect to a person when "a Justice Department referral is in effect with respect to such person." And Section 7602(c)(2) defines in copious detail the phrase "Justice Department referral is in effect"; that definition refers only to the operations of the United States Justice Department and does not, by its terms, purport to apply to foreign governments. The court of appeals' imposition of a "foreign referral" restriction thus can be upheld only if the term "Justice Department referral" is read to cover, not only the circumstances described in its detailed statutory definition, but also an analogous stage of a foreign tax investigation in treaty summons cases. Such an expanded definition is not proper as a matter of statutory interpretation—particularly where, as here, it is without support in the legislative history or purpose.

The legislative purpose underlying Section 7602(c) in no way suggests that Congress intended to establish as a prerequisite to the enforcement of a treaty summons the requirement that the foreign tax investigation not have reached a stage analogous to a Justice Department referral. As we have noted (page 17, *supra*), the legislative history of Section 7602(c), which codified the Justice Department referral restriction on which the Court unanimously agreed in *LaSalle Nat'l Bank*, indicates that Congress intended to promote the same policies identified by the Court in its decision—namely, to avoid expanding "criminal discovery or * * * infring[ing] on the role of the grand jury as a principal tool of criminal prosecution" (1 S. Rep. 97-494, *supra*, at 286). These considerations are tied

directly to the structure of the law enforcement system of the United States and therefore bear no relevance to the enforcement of treaty summonses, where the proposed inquiry would be into the status of the foreign tax investigation.

The fundamental irrelevance of the referral inquiry in the treaty summons area is made clear by the Court's detailed discussion in *LaSalle Nat'l Bank* of the rationale for the Justice Department referral limitation in domestic summons cases. 437 U.S. at 312-313. The Court explained that the limitation derives from the division of authority in our system for the conduct of criminal investigations and prosecutions. In this country, the Court noted, the grand jury has been established as the "principal tool of criminal accusation," and "criminal discovery" is limited. The Court found that Congress did not intend that the summons power be used to alter this framework, and Congress confirmed this conclusion when it enacted Section 7602(c). Because of corresponding divisions of authority in the Executive Branch, the Court concluded in *LaSalle Nat'l Bank* that permitting the issuance of a summons after a Justice Department referral had been made would create a "substantial" "likelihood that discovery would be broadened or the role of the grand jury infringed." The Court explained that the IRS has no power to bring a prosecution, but instead must refer a case to the Justice Department for that purpose; moreover, a referral also deprives the IRS of its ability to compromise both the criminal and civil aspects of a fraud case. Therefore, the Court concluded, once a referral has occurred, the degree of necessary information exchange between the two agencies would be such that IRS use of summoned information to determine civil liability "would inevitably result in criminal discovery." In sum, the Court held that a prohibition on the issuance of a summons after a Justice Department referral was necessary as a "prophylactic" measure to prevent infringement of the

grand jury's principal investigative role and our legal system's limitations on criminal discovery. See also 437 U.S. at 320-321 (Stewart, J., dissenting).[12]

Plainly, these domestic policy considerations are not advanced in the slightest by imposing a "foreign referral" requirement in treaty summons cases. These policies are "wholly internal—related solely to prosecution in this country, to our division of governmental functions, to our continued use of the grand jury in federal criminal matters, and to our position on pre-trial discovery in our criminal cases" (*United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d at 52). When a summons issued at the request of a treaty partner is enforced, these policies are not affected; regardless of the status of the foreign tax investigation, there is no encroachment upon the function of the institution of the grand jury in this country nor is there an expansion of the Justice Department's discovery power. In accordance with our treaty obligations, the information is simply provided to a foreign government, which uses it for its own domestic purposes in accordance with its own laws.

Nor do Canadian taxpayers who use banks in this country have any right to expect that the restrictions afforded against criminal discovery by this country will apply to them in connection with a Canadian investigation of their

[12] To the extent that the Court's decision in *LaSalle Nat'l Bank* went beyond a bright-line limitation grounded in a Justice Department referral, it was rejected by Congress when it enacted Section 7602(c). Congress at that time also rejected the suggestion in the majority opinion (see 437 U.S. at 316) that assisting a criminal investigation is not a legitimate purpose for the issuance of a summons. Section 7602(b) provides that the purposes for which the IRS may issue a summons "include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws." See 1 S. Rep. 97-494, *supra*, at 286.

Canadian tax liabilities. "The United States has no interest in thrusting its policy (in this regard) into Canadian prosecutions, [and] Canada has no interest in having that policy applied to its taxpayers" (*United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d at 52). The referral limitation of Section 7602(c) was designed to advance domestic policies that apply to investigations by the United States government, and there is no reason to expand its application beyond its plain terms to impose an analogous restriction on foreign tax investigations.

Indeed, even in the unlikely event that Congress had some interest in affecting the conduct of foreign tax investigations, it would be illogical for it to attempt to export the domestic policy considerations that underlie Section 7602(c) by imposing an analogous "foreign referral" restriction. As the Second Circuit stated in *Manufacturers*, these policy considerations are peculiar to our law enforcement system and are "not applicable to Canada which does not have our marked separations and does not normally use the grand jury" (703 F.2d at 52). Indeed, the grand jury is no longer used at all in Canada. See 2 R.S.C. ch. 34, §§ 506, 507 (1970), as amended by the Criminal Law Amendment Act, 1985, ch. 19, §§ 114, 115; *Re McKibbon and the Queen*, 6 D.L.R. (4th) 1, 20-35 (1984); *id.* at 5 (Dickson, J., dissenting).[13] Canada is by no means unusual in this respect; none of the 34 tax treaty partners with which the United States exchanges information (see

[13] In our petition (at 13), we mistakenly stated that the grand jury was still in use in limited circumstances in Nova Scotia. That was true for a period subsequent to the Second Circuit's decision in *Manufacturers*, but Nova Scotia abolished the grand jury in August 1984. See An Act to Amend Chapter 12 of the Acts of 1969, the Juries Act § 2, proclaimed in Nova Scotia in 1984.

note 17, *infra*), uses the grand jury in its criminal justice system.[14]

Nor does Canada have a policy like that of the United States respecting criminal discovery that requires a separation between civil and criminal investigations akin to that triggered by a Justice Department referral in this country. The Canadian system pervasively allows information to be shared between officials interested in civil liability and those concerned with criminal prosecution; Section 241(4) of the Canadian Income Tax Act, 5 Can. Tax Rep. (CCH) ¶ 27,742 (1987) provides that, for any purpose related to the revenue, the Minister may disclose to any authorized person of the Canadian government any material obtained by him in the course of his investigation. See also *United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d at 51. Thus, the policies that underlie the limitation in Section 7602(c) on issuing summonses after a Justice Department referral simply have no application in Canada and provide no basis for the rule adopted by the court below reading a "foreign referral" restriction into the statute.[15]

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[14] The grand jury is an institution of Common Law systems, whose beginnings in England are traced back to 1166. See generally G. Edwards, Jr., *The Grand Jury* 1-44 (1906); R. Younger, *The People's Panel* 1-4 (1963). Although the institution of the grand jury is constitutionally guaranteed in the United States by the Fifth Amendment, it has been abolished, as in Canada, by our other tax treaty partners having Common Law systems: (1) the United Kingdom (see R. Younger, *supra*, at 224-226); (2) Australia (see *Saywell* v. *Attorney-General*, [1982] 2 N.Z.L.R. 97); (3) Ireland (see *State* v. *O'Malley*, [1978] I.R. 269); (4) Jamaica (see *Grant* v. *Director of Public Prosecutions*, [1982] App. Cas. 190); and (5) New Zealand (see *Saywell* v. *Attorney-General*, *supra*).

[15] Of course, if the use of the summoned information by Canada does violate some Canadian law or policy, respondents are free to invoke their own domestic law to raise an objection in a Canadian proceeding.

3. The interpretation of the court of appeals not only does not advance any discernible policy goal, it actually is inimical to important public interests. Imposing a "foreign referral" requirement would impede the United States' ability to comply with treaty requests because it would require the competent authority to make additional findings relating to the nature and status of the foreign tax investigation that go well beyond what has been required until now. Compare *United States* v. *Bache Halsey Stuart, Inc.*, 563 F. Supp. 898, 900 (S.D.N.Y. 1982). Even more serious delays would be introduced at the enforcement stage since the court would be required to decide a new and complex issue in an adversary setting, providing the party opposing enforcement with an effective means of delaying the receipt of information by the treaty partner. Thus, the court of appeals' holding would seriously undermine the well established rule that summons enforcement proceedings should be "summary" in nature so as not unduly to delay investigations (see *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971); *United States* v. *Kis*, 658 F.2d 526, 535-536 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Davis*, 636 F.2d 1028, 1038 (5th Cir.), cert. denied, 454 U.S. 862 (1981)). See *Michigan* v. *Doran*, 439 U.S. at 288 (limiting scope of inquiry at state extradition hearing because it is designed to be "summary"). As Judge Wright noted below in dissent, the court of appeals' decision "will *increase* rather than decrease enforcement litigation because the courts will have to determine ultimately exactly what kinds of [foreign] investigations are 'analogous' to a Justice Department referral" (Pet. App. 20a (emphasis in original)).

It is clear that Congress, in enacting Section 7602(c), did not intend to create this additional obstacle to prompt enforcement of treaty summonses. The primary motivation

for the enactment of that section was to alleviate delays in summons enforcement. Congress was concerned that the Court's decision in *LaSalle Nat'l Bank* had led to time-consuming litigation over the question whether the IRS as an institution had abandoned the pursuit of civil tax liability; the legislative history explains that *LaSalle Nat'l Bank* had spawned "protracted litigation" that was interfering with the principle that "summons enforcement proceedings should be summary in nature" (1 S. Rep. 97-494, *supra,* at 285). To eliminate that wasteful litigation, Congress adopted a bright-line rule in Section 7602(c) keyed to the existence of a Justice Department referral. It is highly implausible that Congress, while it was streamlining enforcement proceedings by eliminating the difficult inquiry into the IRS's "institutional" abandonment of a civil inquiry, at the same time required by implication an even more difficult inquiry in treaty summons cases into whether a foreign analogue to a Justice Department referral has occurred—an inquiry that is bound to interfere substantially with the summary nature of proceedings to enforce such summonses.

Indeed, it is something of an understatement to describe the inquiry required by the court of appeals as complex or difficult; given the substantial differences between our legal system and governmental structure and those of other countries, determining whether a treaty partner has made the equivalent of a Justice Department referral is highly impracticable. Legal systems throughout the world are highly diverse; for example, one authority classifies the various legal systems of the world into eight distinct families, and some countries have legal systems that are hybrids of one or more of these families. See 1 K. Zweigert and H. Kotz, *An Introduction to Comparative Law* 57-67

(1977).[16] The United States has income tax conventions with countries from seven of these groups and is negotiating with a country from the eighth.[17]

The mere existence of this diversity makes the inquiry contemplated by the court of appeals a daunting task. That task is further complicated by the fact that a particular legal system may not always be completely defined by the "books"; there are often "unwritten rules" that "in practice supersede or bypass rules of law fixed by the legislature or the judiciary" (1 K. Zweigert and H. Kotz, *supra,* at 29). And, significantly, the governmental structure that is established to administer these diverse systems will generally be quite different from that of the United States. In particular, there is no reason to assume that the ministry of justice of a given treaty partner will be responsible for the prosecution of tax offenses.[18] If not, it is difficult to see how the search for a foreign analogue to a

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[16] These families are the: (1) Romanistic family; (2) Germanic family; (3) Nordic family; (4) Common Law family; (5) Socialist family; (6) Far Eastern systems; (7) Islamic systems; and (8) Hindu law. 1 K. Zweigert and H. Kotz, *supra,* at 67.

[17] The United States has in force income tax conventions containing exchange of information provisions with the following 34 countries: Australia, Austria, Barbados, Belgium, Canada, Cyprus, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Korea, Luxembourg, Malta, Morocco, Netherlands, New Zealand, Norway, Pakistan, People's Republic of China, Philippines, Poland, Romania, Sweden, Switzerland, Trinidad and Tobago, and the United Kingdom. 17 Tax Mgmt. Int'l J. 225 (1988). The United States is conducting negotiations with India (*id.* at 226), which falls into the Hindu law family (see 1 K. Zweigert and H. Kotz, *supra,* at 374-380).

[18] Civil Law countries typically divide the administration of their laws into three categories: private or "substantive" civil law; criminal law; and administrative law. See generally G. Glos, *Comparative Law* 5-32 (1979). Civil Law countries have a separate court system dedicated solely to adjudicating "administrative law," into which tax

Justice Department referral can meaningfully be performed. Thus, the court of appeals' directive to find an analogy in other legal systems to a concept that is unique to the legal system and governmental structure of the United States is virtually impossible to satisfy in the case of some of our treaty partners.

Finally, the restriction adopted by the court of appeals would undermine the general purposes of the treaty and threaten interference with the conduct of our foreign relations. As the Second Circuit pointed out in *Manufacturers,* Canada, or another treaty partner, is not likely to look kindly upon a decision by a United States court refusing to enforce a treaty summons because of a "foreign referral" restriction (703 F.2d at 52-53):

> Since the need was Canada's alone, and use of the information was to be made only there, Canada might consider it a failure on this country's part to comply with the treaty's commitment if enforcement of the summonses were refused on grounds Canada does not recognize in its own territory or with respect to its own income taxes. Canada might wonder what concern the United States has in applying its internal policy to a case in which this country's taxes and citizens are not at all involved—only Canada's.

Moreover, as we have noted (page 33, *supra*), the restriction imposed by the court of appeals plainly serves to retard the accomplishment of the treaty's basic goal of enhancing the free flow of information with a view towards reducing fiscal evasion. Straining the language of the statute to find such a restriction is at odds with the

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matters usually fall (*id.* at 24-28). For example, in some Cantons of Switzerland "tax fraud," the most severe tax offense, is prosecuted in the administrative court system rather than in the criminal courts. See W. Meier, *Banking Secrecy in Swiss and International Taxation,* 7 Int'l Law. 26 (1973).

general principle that domestic law should be interpreted, if possible, to avoid restricting the scope of a preexisting treaty provision. See *United States* v. *Lee Yen Tai,* 185 U.S. 213, 222 (1902); see also I.R.C. § 7852(d).[19] In short, there is no basis for interpreting Section 7602(c) to require, in a treaty summons case, an inquiry into whether the foreign investigation has reached a stage analogous to a Justice Department referral.

C. The Court of Appeals Erred in Placing upon the Government the Burden of Showing the Absence of a "Foreign Referral"

Even if we assume arguendo that the court of appeals was correct in holding that enforcement of a treaty summons should be denied if the foreign investigation has reached a stage analogous to a Justice Department referral, the court erred in placing upon the government the burden of showing that the investigation has not reached that stage. The court stated that the IRS was in the best position to make this determination because it could be expected to be more familiar with Canadian procedures than the taxpayer (Pet. App. 13a). The court also appeared to rely upon the premise that the IRS would be required in a domestic summons case to establish, as part of its prima facie case for enforcement, that a Justice Department referral is not in effect (see *ibid.*). This premise is erroneous. The IRS is not required to demonstrate, as part of its prima facie case for enforcement, the absence of a Justice Department referral in a domestic case; hence, it

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[19] Section 7852(d) of the Code provides that "[n]o provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of the enactment of this title." See *Manufacturers & Traders Trust Co.,* 703 F.2d at 53; see also *United States* v. *A.L. Burbank & Co.,* 525 F.2d at 14.

should not be required to show the absence of a "foreign referral" in a treaty summons case.

To obtain enforcement of a domestic summons, the government bears the burden of showing that the requirements of *United States* v. *Powell, supra,* are met—namely, that the summons authority is being invoked in good faith for a legitimate purpose authorized by the Code. This is ordinarily accomplished by means of an affidavit of the agent issuing the summons stating that the *Powell* requirements are satisfied. The courts have recognized that the burden of making this prima facie showing is a "slight one," but have explained that this procedure is appropriate in order that the enforcement powers of the IRS not be unduly restricted. Once the IRS has made this prima facie showing of good faith, the burden, described as a "heavy one," shifts to the taxpayer to demonstrate that the summons was issued for an improper purpose. See, *e.g., United States* v. *Balanced Financial Management, Inc.*, 769 F.2d 1440, 1443-1445 (10th Cir. 1985); *United States* v. *Kis,* 658 F.2d at 535-536; *United States* v. *Garden State Nat'l Bank,* 607 F.2d 61, 70-71 (3d Cir. 1979).

This Court's opinion in *LaSalle Nat'l Bank* explicitly answered the question whether the IRS must show the absence of a Justice Department referral as part of its prima facie case, or, conversely, whether the taxpayer must show the existence of a referral to rebut the prima facie case for enforcement. In holding that a summons should not be enforced if a Justice Department referral has been made, the Court stated that the person opposing enforcement bore the "heavy" burden "to disprove the actual existence of a valid civil tax examination or collection purpose" (437 U.S. at 316). The lower courts followed the plain import of this language and recognized that the claim that a summons should not be enforced for failure

to satisfy *LaSalle Nat'l Bank* was to be resolved at the "rebuttal" stage of the enforcement proceeding. Once the government had established by submission of the agent's affidavit that the basic *Powell* factors were satisfied, it was left to the person opposing enforcement to disprove the existence of a valid civil tax purpose by showing that there had been a Justice Department referral or an institutional decision by the IRS to abandon the pursuit of civil tax liability. See, *e.g., United States* v. *Kis,* 658 F.2d at 538-539, 541; *United States* v. *Garden State Nat'l Bank,* 607 F.2d at 68.

When Congress codified in Section 7602(c) the referral restriction set forth in *LaSalle Nat'l Bank,* it did not purport to disturb the allocation of the burden of proof that the Court had made. To the contrary, the legislative history clearly shows that Congress considered the issue and affirmatively decided that the burden of showing a Justice Department referral should be on the party opposing enforcement and therefore that demonstrating the absence of such a referral is not an element of the IRS's prima facie case. The Senate Report states (1 S. Rep. 97-494, *supra,* at 283 (emphasis added)):

> [T]he Secretary will have to meet all the requirements of *United States* v. *Powell,* 379 U.S. 48 (1964), including a showing that the individual investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that all the administrative steps required by the Code have been followed. *As a defense to the enforcement of the summons,* the taxpayer may show that the taxpayer's case has been referred to the Department of Justice * * *.

Thus, the conclusion is inescapable that Congress intended the Justice Department referral restriction of Section

7602(c) to be a taxpayer defense, rather than an element of the prima facie showing to be made by the IRS. Accord *Pickel* v. *United States,* 746 F.2d 176, 184 (3d Cir. 1984) ("[t]he Pickels, as the parties opposing the summonses, bore the burden of showing * * * that a Justice Department referral had taken place"); *United States* v. *Naden,* 57 A.F.T.R.2d (P-H) ¶ 86-632 (E.D. Cal. 1986); *Driggers* v. *United States,* 86-1 U.S. Tax Cas. (CCH) ¶ 9479 (W.D. Pa. 1986).

The court of appeals' decision is also wrong as a matter of sound summons enforcement policy. Placing the burden of proof on the IRS to show the absence of a referral would interfere with the "summary" nature of summons enforcement proceedings (*Donaldson* v. *United States,* 400 U.S. at 529), which is a critical feature of the enforcement structure that guards against government abuse of the summons power, while keeping disruption of the IRS's legitimate investigative activities to a minimum. Under the court of appeals' approach, the IRS would have to determine in every case that no Justice Department referral was in effect before applying for enforcement of a summons. That inquiry may be time-consuming and quite wasteful in the vast majority of cases where there is no basis for suspecting that a referral is in effect.[20] Under the

[20] It is true, as the court of appeals observed (Pet. App. 13a), that in some cases government affidavits do disclose referral status. These ordinarily are cases where the absence of a referral is known to the agent, and therefore no expenditure of time or resouces is required to disclose referral status in the affidavit. But that does not mean that the government is under any legal obligation to make a showing that no referral is in effect – a showing that would be quite burdensome in some cases. While it is ordinarily not difficult or time-consuming for the IRS to ascertain whether it has initiated a Justice Department referral (see I.R.C. § 7602(c)(2)(A)(i)), the statute also provides that a "Justice Department referral" is in effect when there has been a request by Justice for return information from the IRS pursuant to

approach reflected in *LaSalle Nat'l Bank* and in the legislative history of Section 7206(c), on the other hand, an inquiry into referral status will have to be made only in that limited number of cases in which there is some basis for believing that a referral may be in effect. And, of course, the deleterious effects of the burden of proof proposed by the court of appeals for domestic summonses are magnified in the treaty summons area because of the exceedingly complex nature of the inquiry into whether an analogous "foreign referral" has occurred. Accordingly, the IRS should not be required to demonstrate the absence of a referral for criminal prosecution as part of its prima facie case for enforcement; any objection to a summons on the ground that a referral is in effect must be made by the taxpayer as part of the "rebuttal" stage of the proceeding, in accordance with the clear intent of Congress.

More fundamentally, however, for the reasons we have explained, any such objection in a treaty summons case, based on the status of the treaty partner's investigation, is, in any event, entirely irrelevant to whether the summons should be enforced – and therefore not a proper subject of inquiry in the enforcement proceeding.

I.R.C. § 6103(h)(3)(B). See I.R.C. § 7602(c)(2)(A)(ii). It is often quite difficult for the agent issuing the summons to determine whether there has been such a "reverse referral" in a given case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Articles XIX and XXI of the Convention Respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1405-1406 provide:

ARTICLE XIX

With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws in so far as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates.

The information to be furnished under the first paragraph of this Article, whether in the ordinary course or on request, may be exchanged directly between the competent authorities of the two contracting States.

ARTICLE XXI

1. If the Minister in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner, the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America.

2. If the Commissioner in the determination of the income tax liability of any person under any of the revenue laws of the United States of America deems it necessary to secure the cooperation of the Minister, the Minister may, upon request, furnish the Commissioner such information bearing upon the matter as the Minister is entitled to obtain under the revenue laws of Canada.

Section 7602 of the Internal Revenue Code, 26 U.S.C. 7602 provides:

Examination of books and witnesses

(a) Authority to summon, etc.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized –

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense

The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense con-

nected with the administration or enforcement of the internal revenue laws.

(c) No administrative summons when there is Justice Department referral

(1) Limitation of authority

No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect

For purposes of this subsection –

(A) In general

A Justice Department referral is in effect with respect to any person if –

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination

A Justice Department referral shall cease to be in effect with respect to a person when –

(i) the Attorney General notifies the Secretary, in writing, that –

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately

For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

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No. 87-[illegible]

In The

Supreme Court of the United States

October Term, 1987

UNITED STATES OF AMERICA,

Petitioner,

v.

PHILIP GEORGE STUART, SR.,
AND MONS KAPOOR,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Philip George Stuart, Sr. and Mons Kapoor are Canadian citizens and taxpayers, residing in the Province of British Columbia. They received notice that the Internal Revenue Service ("IRS") had issued and served summonses on the Northwestern Commercial Bank in Bellingham, Washington at the request of the Department of National Revenue, Canada ("Revenue Canada") seeking production of records regarding their financial transactions.[1] The IRS was not claiming or investigating any United States tax liability. (J.A. p. 19, par. 6; p. 23, par. 6 (Stuart); CR 1, par. 6; CR 5, par. 6 (Kapoor)). Stuart and Kapoor commenced proceedings under 26 U.S.C. § 7609(b)(2) to quash the summonses. The Northwestern Commercial Bank was notified by counsel for Kapoor and Stuart of the pendency of those proceedings and instructed, pursuant to 26 U.S.C. § 7609(d), not to produce any records unless a court order directing it to do so was obtained.

The petitions to quash challenged the enforcement of the summonses on the grounds that they were not issued for a lawful purpose, did not seek information relevant to any inquiry concerning an internal revenue tax of the United States, and that the information could be requested directly under applicable Canadian statutes and regula-

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[1] Stuart and Kapoor also received notice that the IRS had issued summonses to another third-party recordkeeper located in the Western District of Washington. Petitions challenging those summonses were filed. The petitions were dismissed as moot after the IRS withdrew those summonses.

tions.[2] The petitions also alleged that since the summonses were not issued for a lawful purpose, the IRS had therefore failed to follow the required administrative procedures.

After receiving the IRS' responses to their petitions to quash, Stuart and Kapoor each served a set of interrogatories on the IRS consisting of six questions seeking limited discovery concerning the criminal nature of Revenue Canada's investigation. (J.A. pp. 38-40.) The IRS refused to provide any discovery responses whatsoever stating that Revenue Canada's letter request for an exchange of information was considered "secret" and that the IRS does not allow its own counsel, much less a party challenging a summons, access to such information. (J.A. pp. 34, 35.)

At the same time it filed its objections to providing any discovery, the IRS filed motions for summary enforcement of the summonses. The Affidavits of Thomas J. Clancey, Director of the IRS Foreign Operations District, disclosed that "[t]he Canadian taxing authorities' investigation of [the petitioner] is a criminal investigation, preliminary stage." (J.A. p. 27, par. 2) This disclosure of the criminal nature of Revenue Canada's investigation made the need for the discovery sought by Stuart and Kapoor even more acute. Stuart and Kapoor filed

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2 Stuart's petition also alleged, on the basis of information and belief, that the IRS had failed to give him proper notice under 26 U.S.C. § 7609(a)(1) and that the summons was therefore unenforceable. Subsequently, Stuart learned that notice had been properly given and this objection was withdrawn during oral argument on the IRS' motion for summary enforcement of the summonses.

memoranda in opposition to the IRS' motions for summary enforcement.

As both proceedings had previously been referred to Magistrate John L. Weinberg pursuant to 28 U.S.C. § 636 (b)(1) and Magistrate's Rule 4(a), Local Rules of the Western District of Washington, Magistrate Weinberg heard oral argument on both summary enforcement motions at a single hearing on July 27, 1984. No evidentiary hearing was held at that time or later, the motions being determined on the basis of the pleadings and records then on file.

On September 30, 1985, Magistrate Weinberg's Report and Recommendation recommending enforcement was filed in the Stuart proceeding. The same Report and Recommendation was filed the next day in the Kapoor proceeding. Stuart and Kapoor filed objections to the reports pursuant to Magistrate's Rule 4(c), Local Rules of the Western District of Washington. In addition to renewing the objections made in their memoranda opposing the motions for summary enforcement, Stuart and Kapoor raised the issue of whether the Convention Respecting Double Taxation, March 4, 1942, United States-Canada, 56 Stat. 1399, T.S. No. 983 (as amended) ("1942 Treaty") or the Convention with Respect to Taxes on Income and on Capital, September 26, 1980, United States-Canada, *reprinted in* 1 Tax Treaties (CCH) ¶ 1301 (1984), controlled enforcement of the summonses. Stuart's and Kapoor's objections to the Magistrate's Report also requested an opportunity to pursue discovery regarding the equivalency of Revenue Canada's "criminal investigation, preliminary stage" to a referral to the United States Department of Justice. (C.R. No. 25 (Stuart); C.R. No. 17 (Kapoor).)

The two United States District Court judges to whom the petitions had been originally assigned each adopted the Magistrate's Report and Recommendation without modification. In neither case was the Magistrate's Report and Recommendation nor the district court's order adopting it and ordering enforcement reported. Notices of appeal were timely filed in each case. The United States Court of Appeals for the Ninth Circuit consolidated the two appeals and, on the motion of Kapoor and Stuart, stayed enforcement of the summonses pending the outcome of the appeals. The appeals were argued and submitted on December 4, 1986. The court's opinion was filed on March 24, 1987 and is reported at 813 F.2d 243.

The court of appeals held that since the 1942 Treaty was in force at the dates when both the request for exchange of information was made by Revenue Canada and when the IRS made its decision to honor that request, that Treaty rather than the 1980 Treaty, which was in effect at the time the district court's enforcement orders were entered, would control. The court rejected the government's argument that the decision by the IRS to honor a treaty request was a political question not properly reviewed by the courts. The court's analysis was based on *Baker v. Carr,* 369 U.S. 186 (1962). The court of appeals then examined the merits of the lack of good faith objection to enforcement raised by Stuart and Kapoor under *United States v. Powell,* 379 U.S. 48 (1964). The court held that the good faith requirement applied in the Treaty request context. Noting the impact of Internal Revenue Code § 7602(b)-(c), enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), and which

established a "bright line" test, the Court declined to follow the pre-TEFRA decision of *United States v. Manufacturers & Traders Trust Co.,* 703 F.2d 47 (2nd Cir. 1983). The court held that it was the government's burden to show a lack of an analogous referral in order to establish its prima facie case for enforcement, reasoning that such an approach avoided the anomaly of recognizing a defense to enforcement and then denying the taxpayer access to the information needed to establish the defense. Finally, the court rejected the unilateral post-argument submission of materials by the IRS, which materials the government argued established the lack of an analogous referral by Revenue Canada.

The United States petitioned the court of appeals for a rehearing with a suggestion for a rehearing en banc. That petition was denied. On December 24, 1987, following an extension of time, a petition for a writ of certiorari was filed by the United States. Certiorari was granted on May 2, 1988.

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SUMMARY OF ARGUMENT

A. The judicial analysis necessary to determine a challenge to the enforcement of a summons issued at the request of a Tax Treaty partner is not the type of inquiry barred by the political question doctrine. *See Baker v. Carr,* 369 U.S. 186 (1962); *Goldwater v. Carter,* 444 U.S. 996 (1979). While the executive branch is given the responsibility to make treaties and to conduct the foreign relations of the United States, the Constitution does not

charge the executive branch with the sole responsibility to interpret treaties nor with the enforcement of their provisions utilizing domestic law. The "bright line" test adopted by the court of appeals below to determine the existence of the good faith prerequisite to summons enforcement established in *United States v. Powell,* 379 U.S. 48 (1964) does not involve an inquiry beyond the normal scope of judicial experience or expertise. Finally, the court's interest in preventing an abuse of its process, which process must be used to enforce summonses, overrides any modest prudential concerns that may be implicated by such an inquiry.

B. The 1942 Treaty describes the information the IRS may obtain and exchange as that which it is "in a position to obtain under its revenue laws" (Art. XIX) or as the "Commissioner [of the IRS] is entitled to obtain under the revenue laws of the United States of America." (Art. XXI) The legislative history of the 1942 Treaty does not disclose any intention or expectation on the part of the contracting nations that requests made pursuant to the information exchange provisions would not be subject to United States statutory and decisional law. A defense to summonses enforcement based on a level of criminal prosecutorial involvement has been established both by decisional law (*United States v. Powell, supra*) and statutory law (IRC § 7602(c)). It is both reasonable and logical to apply that aspect of the "revenue laws" of the United States to treaty summons enforcement. To limit the good faith inquiry to the IRS' activities, as the government argues, would be meaningless where, as here, no United States tax liability is at issue. The foreign referral requirement discussed in the *Stuart* opinion is

a practical, non-burdensome test that will foster uniform results in enforcement proceedings while avoiding the need to examine the changing interplay of civil and criminal investigation and prosecution under foreign law.

C. Treaty summons enforcement proceedings should be summary in nature. The burden of proof required of the government to establish its prima facie case for enforcement is slight. The government has ready access to the information necessary to enable its competent authority to make the required averments regarding lack of an analogous referral by Revenue Canada. If the foreign referral or good faith requirement were to remain solely an affirmative defense in treaty enforcement proceedings, it would be necessary to expand the now severely restricted scope of discovery available to parties challenging enforcement. Such an expansion would be necessary to prevent the unfair anomaly of recognizing a defense to enforcement, but denying access to the information necessary to establish that defense.

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ARGUMENT

I. The Political Question Doctrine Does Not Bar this Court from Determining the Availability and Applicability of the Good Faith Restriction on Tax Treaty Summons Enforcement

In *Baker v. Carr,* 369 U.S. 186 (1962), this court undertook a survey of its earlier political question decisions in an effort to define the contours of that doctrine prior to applying it in that voting rights case. One of the rubrics

under which the case law was examined was "foreign relations." After noting that sweeping statements regarding the exclusivity of the executive's prerogative in the conduct of foreign relations abounded, the court went on to observe:

> Yet, it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and the possible consequences of judicial action.

Baker v. Carr, supra, 369 U.S. at 211.

The plurality opinion by Justice Powell in *Goldwater v. Carter,* 444 U.S. 996, 998 (1979) distilled the factors identified for consideration in *Baker v. Carr* down to three inquiries:

> [1] Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government?
>
> [2] Would resolution of the question demand that a court move beyond areas of judicial expertise?
>
> [3] Do prudential considerations counsel against judicial intervention?

The circumstances surrounding the enforcement of the Stuart and Kapoor summonses dictate negative answers to all three of these questions.

First, while Article II, Section 2 of the Constitution authorizes the President to make treaties with the advice and consent of the Senate, there is no similar textual, constitutional provision making the executive branch the sole arbiter of controversies arising under those treaties. Just the opposite is true. The courts created under Article III of the Constitution are charged with the power to determine cases or controversies, including those arising under the treaties of the United States. U.S. Const. Art. III, § 2; 28 U.S.C. § 1331.

Second, there is no "lack of judicially discoverable and management standards for resolving" the challenges raised by appellants; nor is a decision impossible "without an initial policy determination of a kind clearly for nonjudicial discretion." *See Baker v. Carr, supra,* 369 U.S. at 217. Treaty interpretation is a well-recognized role of the judicial branch. *See, e.g. Kolovrat v. Oregon,* 366 U.S. 187 (1961); *Perkins v. Elg,* 307 U.S. 325 (1939); *United States v. Decker,* 600 F.2d 733 (9th Cir. 1979), *cert. denied,* 444 U.S. 855 (1979).

In *Decker* the government argued that the decision to approve regulations promulgated by the International Pacific Salmon Fisheries Commission, which commission was established pursuant to a treaty between the United States and Canada, was an exercise of the executive branch's foreign affairs prerogative. Therefore, the decision was not subject to judicial scrutiny. The court of appeals held that it was not barred by the political question doctrine from reviewing the appellants' criminal convictions based on a violation of those regulations, stating:

> In those few cases involving interpretation of treaties when the political question doctrine precludes review, that doctrine has narrow confines. The principal area

> of nonjusticiability concerns the right of the executive to abrogate a treaty. (citations and footnote omitted)

United States v. Decker, supra, 600 F.2d at 737.

The challenges to summons enforcement raised by Stuart and Kapoor concern treaty interpretation, search and seizure constraints, enforcement of administrative summonses and the scope of allowable discovery in proceedings to challenge those summonses. All of these topics are regular concerns of the courts and are areas in which substantial case law already exists.

Third, prudential concerns do not require that this court refuse to review the propriety of the enforcement of summonses directed to a domestic bank, which enforcement is being challenged under a statute specifically providing for review. While the documents, if obtained, would ultimately be forwarded to Canadian authorities, it can hardly be expected that the propriety of the acquisition of those documents by the IRS is not a proper subject for judicial review. The enforcement of the summonses must rely on the courts' process and the courts may not allow that process to be abused. *United States v. Powell,* 379 U.S. 48, 58 (1964).

A decision to leave the "competent authority's" determination to force the production of documents essentially unreviewable in the treaty summons context would be to abdicate responsibility for guarding against abuses of the court's process.

II. The Good Faith Requirement for Tax Treaty Summons Enforcement Is Established by the 1942 Treaty and by United States Revenue Law

The relevant portions of the two articles of the 1942 Treaty regarding information exchange requests provide as follows:

> *Article XIX*
>
> With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to *obtain under its revenue laws* in so far as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates.
>
> • • •
>
> *Article XXI*
>
> 1. If the Minister [of the Department of National Revenue] in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner [of the IRS], the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commission *is entitled to obtain under the revenue laws of the United States of America.*

1942 Treaty, Art. XIX, ¶ 1 and Art. XXI, ¶ 1 (emphasis added).

The interpretation of a treaty must begin with its language. The clear import of the treaty language controls unless such application will cause a result that is clearly at odds with the intention of the parties to the treaty. *Sumitomo Shoji America, Inc. v. Avagliano,* 457

U.S. 176, 180 (1982) (citing *Maximov v. United States,* 373 U.S. 49, 54 (1963)). The clear import of Articles XIX and XXI is that the Revenue Canada cannot expect to receive and the IRS cannot expect to obtain or provide information in a fashion inconsistent with United States summons enforcement law. The use of the foreign referral test proposed by the *Stuart* opinion below would not interfere with the treaty parties' intention to prevent fiscal evasion. In fact, the government has already argued that it can meet that test under the facts of these cases. *Stuart,* 813 F.2d at 250.

The legislative history offered by the government as an aid to interpretation of the 1942 Treaty discloses no more than the expectation that the information exchange provisions would allow one country to request the other to provide it with information for use in an investigation by the requesting country of its citizens' tax liability. *See* Brief of the United States, p. 29, footnote 11. Such legislative history does not require this court to ignore the plain language of Articles XIX and XXI, which must remain the focus of interpretation. *See e.g. S & E Contractors, Inc. v. United States,* 406 U.S. 1, 13 n.9 (1972). There is nothing in the legislative history to suggest that either Canada or the United States expected that the IRS would be freed from the need to employ process of court to enforce summonses issued pursuant to the Treaty; nor that in doing so, a court would be powerless to prevent abuses of its process. *See United States v. Powell,* 379 U.S. 48, 58 (1964).

Prior to passage of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Public Law No. 97-248, 96 Stat. 324 (1982), an "institutional bad faith" defense to summons enforcement had been recognized by the courts and had been the focus of considerable concern. *See United States v. LaSalle Nat'l Bank,* 437 U.S. 298 (1978)[3]; *Donaldson v. United States,* 400 U.S. 517 (1971). In an effort to streamline summons enforcement proceedings, the courts have also severely restricted a taxpayer's right to seek discovery of facts to challenge the government's prima facie case. *See, e.g. United States v. Church of Scientology,* 520 F.2d 818 (9th Cir. 1975); *United States v. Samuels, Kramer and Co.,* 712 F.2d 1342 (9th Cir. 1983). The *Stuart* majority opinion affirms the application of this aspect of "judicial gloss" to foreign tax treaty summons enforcement.

Stuart and Kapoor found themselves in a particularly unfair situation as a result. On the one hand, the affidavits submitted by the government disclose that the records sought were for use in a "criminal investigation, preliminary stage," (J.A. p. 28) which they argued raised "sufficient doubt" about the lack of civil purpose, which civil purpose has been held by one court of appeals to be a prerequisite to use of the 1942 Treaty's information exchange provision. *United States v. Samuels, Kramer and Co., supra,* 712 F.2d at 1348. On the other hand, the limited

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[3] As noted in the Brief for the United States at page 17, IRC Section 7602(c) adopted the *LaSalle* minority's suggestion for a "bright-line" test for meeting the *Powell* good faith requirement.

discovery rule prevented them from developing a complete record.

As the *Stuart* opinion noted, the affidavits submitted by the government in support of motions for summary enforcement of a domestic summons sometimes affirmatively attest to the lack of such referral. *Stuart supra,* 813 F.2d at 250. In a domestic summons enforcement case, lack of a referral for criminal prosecution might reasonably be inferred from an enforcement officer's affidavit attesting that: (1) all proper administrative steps for issuance of the summons had been followed, and (2) the summons was issued for a legitimate purpose. This is not so in the tax treaty summons context.

While the two policy considerations identified in *United States v. LaSalle Nat'l Bank,* 437 U.S. 298 (1978), *i.e.,* a desire not to broaden the discovery available to the Justice Department in criminal litigation and a desire not to infringe on the role of the grand jury, are not directly impacted in the tax treaty summons context, there is still strong justification for applying *Powell's* good faith requirement. One such reason is to provide for a uniform test for summons enforcement. If there was any United States tax liability being investigated simultaneously by the IRS through the use of an administrative summons, there is no doubt that Stuart and Kapoor would be afforded the same protection provided by the grand jury as United States citizens despite their Canadian citizenship and residence. *See, e.g., Wong Wing v. United States,* 163 U.S. 228 (1896). This is consistent with the extension to aliens of other constitutional rights once considered the prerogative only of the United States citizens. *See, e.g., Yick Wo v.*

Hopkins, 118 U.S. 356 (1886); *Takaheshi v. Fish and Game Comm.,* 334 U.S. 410 (1948). Uniform standards in summons enforcement proceedings ought to be the rule absent significant justification for discrimination. Uniformity of treatment is and ought to remain a hallmark of our judicial system.

Another justification for interpreting the language of the 1942 Treaty to include a good faith requirement is that the requirement articulated in the *Stuart* opinion can be easily applied. In its petition for rehearing with a suggestion for rehearing en banc directed to the Court of Appeals for the Ninth Circuit, the government argued that the foreign referral test was a "practical impossibility." Petition for Rehearing, p. 15, footnote 8. The test articulated in the *Stuart* opinion is straightforward and does not deserve such characterization. That test simply requests an answer to the following two questions:

> (1) Has Revenue Canada recommended that the Canadian Department of Justice criminally prosecute [the taxpayer]? or
>
> (2) Has Revenue Canada requested the summons at the behest of the Canadian Department of Justice?

Stuart, supra, 813 F.2d at 249. Moreover, as the *Stuart* opinion noted the government submitted materials which it argued proved that there had been no referral by Revenue Canada analogous to a referral to the Justice Department. *Stuart, supra,* 813 F.2d at 250.

The foreign referral test articulated by the *Stuart* majority opinion avoids a potentially difficult inquiry into the status of Canadian procedural law. All the IRS need

do to establish the good faith element of its prima facie case for enforcement is to attest that both of the questions set forth above have been answered in the negative. Having once done so, any party challenging enforcement would be required to present facts sufficient to call into question the validity of those assertions before it would be allowed any discovery or an evidentiary hearing. There would be no need to examine the changing relationship between the newly enacted Canadian Constitution and Bill of Rights with criminal and civil tax investigation and procedure.[4] *See* Appellant's Joint Brief, pp. 18-21.

The government argues that only the good faith of the IRS should be at issue in a treaty summons enforcement proceeding. While the good faith of the IRS may be a proper area of inquiry, it ought not to be the sole area of inquiry. Where, as here, there is no United States tax liability at issue, such an inquiry is pointless as a practical matter.

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[4] The Brief for the United States notes that there are 33 other countries with which the United States currently has in force income tax treaties containing exchange of information provisions. Brief for the United States, p. 41, footnote 7. The government notes that none of those countries currently employ grand juries. There is, of course, no guarantee that a grand jury or similar body will not be employed in the future in those countries. The foreign referral test articulated in the *Stuart* opinion obviates the need to examine or re-examine the status of any of our treaty partners' law in that regard, instead substituting a test based on our revenue laws.

III. The Lack of Foreign Referral Requirement Should Be an Element of the Prima Facie Case for Summons Enforcement in Order to Preserve the Summary Nature of those Proceedings

If the good faith requirement is going to be of any practical importance in the Tax Treaty enforcement setting, then that defense or rather the negation of what would otherwise be a defense, ought to be made an element of the government's prima facie case for enforcement. Under normal circumstances, the burden of establishing a defense rests on the party asserting that defense. However, perhaps in light of ill-founded "tax protestor" challenges to summons enforcement, the courts have denied discovery to the party challenging the summons absent that party's ability to present specific facts calling into serious question the government's prima facie case. *See United States v. Samuels, Kramer and Co.*, 712 F.2d 1342, 1347-1348 (9th Cir. 1983); *United States v. Church of Scientology*, 520 F.2d 818, 823-824 (9th Cir. 1975).

Stuart and Kapoor are not tax protestors, but are nonetheless restricted by that same line of authority from engaging in discovery designed to elicit the facts necessary to establish the lack of good faith. By shifting the initial burden to the government to show a lack of analogous foreign referral, the court:

> avoids the anomaly of "placing a burden of proof upon the taxpayer and then denying access to what may be the very information needed to meet that burden."

Stuart, supra, 813 F.2d at 250 (citing *United States v. Stuckey*, 646 F.2d 1369, 1373-74 (9th Cir. 1981) *cert. denied sub nom. Weinstein v. U.S.*, 455 U.S. 942 (1982)).

Any concern about unwarranted interference in the relations between the United States and Canada are best served by avoiding the need for discovery in treaty summons enforcement proceedings. Presumably, on remand, the United States would file additional affidavits to answer in the negative, the questions posed in the *Stuart* opinion. Unless Stuart and Kapoor could challenge those new affidavits with facts already in their possession, the summonses would be enforced. It is highly unlikely that such a procedure would seriously jeopardize the foreign relations between the United States and Canada, two countries who have so many other more important contractual and commercial relations.[5]

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CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Attorney for Respondents

September 1988

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5 One knowledgeable commentator has estimated that the U.S. competent authority makes and receives as few as 200 such requests per year under the bilateral tax treaties. Guttentag, "Exchange of Information Under Tax Conventions," *ALI-ABA Course of Study: Income Tax Treaties,* 245 at 250 (1982).

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No. 87-1064

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP GEORGE STUART, SR., AND MONS KAPOOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR THE UNITED STATES

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1. In our opening brief (at 18-28), we argued that the district court, in an action to enforce a treaty summons, should not second-guess the determination of the competent authority that it is appropriate to honor a treaty partner's request for information. Both the structure of the 1942 Convention, which is typical of our tax treaties, and the nature of summons enforcement proceedings indicate that the district court should not undertake an independent examination of the treaty partner's request. The treaty is designed to be administered by the respec-

tive competent authorities; in particular, it directs the competent authority of the United States to furnish a treaty partner with requested information in the government's possession if the competent authority determines that the treaty request should be honored—without involving any other government entity in the process. The treaty does not indicate that the competent authority's determination as to the validity of the treaty request should be any less conclusive when it is necessary to issue a domestic summons to obtain the requested information. See U.S. Br. 18-21. Moreover, the established role of the district court in a summons enforcement proceeding is merely to determine whether the IRS has issued the summons in good faith; that inquiry necessarily focuses on the motivation of the IRS, which has issued the summons, and does not require any examination of the circumstances surrounding the treaty partner's request. The merits of the IRS's decision to issue a summons—in this case, the determination that the summoned information is needed to satisfy a valid treaty request, is not a proper subject for inquiry by the district court because the correctness of the IRS's determination that the information should be summoned is not an element of its good faith. See *id.* at 20-24. And there is nothing unusual about this deference to the Executive in matters of tax treaty administration; our system of government often reposes in the Executive, rather than the Judiciary, final responsibility for decisionmaking on particular matters implicating international relations, in order to further the sound administration of foreign policy. See *id.* at 24-27.

Respondents do not challenge any of these arguments made in our opening brief. Instead, they mis-

takenly suggest that we have argued that the "political question doctrine" prevents a district court from considering the validity of a treaty partner's request for information. Applying the analysis derived from *Baker* v. *Carr*, 369 U.S. 186 (1962), respondents then attack this strawman and argue that the validity of the information request of a tax treaty partner is not a "political question." See Resp. Br. 8-10. We do not argue with respondents' conclusion concerning justiciability, except to note that it is entirely irrelevant to this case. If Congress had intended that a district court asked to enforce a treaty summons should make an independent examination into the validity of the treaty partner's request, and had so structured the treaty and the authority of the court, we agree that there would be no "political question" impediment to district court consideration of the issue. But Congress did not so intend and it did not so structure tax treaties and summons enforcement actions. Rather, as explained above and in more detail in our opening brief, it entered into a tax treaty that makes the competent authority the conclusive arbiter of whether a treaty partner's request for information should be honored, and it created a summons enforcement action in which the role of the court is limited to determining whether the summons was issued in good faith.

2. Respondents argue (Br. 11-15) that the tax treaty between the United States and Canada provides that the IRS cannot "obtain or provide information in a fashion inconsistent with United States summons enforcement law" (Br. 12). But respondents do not explain why the treaty provisions upon which they rely would be violated by enforcement of the summons in this case. United States law does

prohibit the enforcement of a summons where there is in effect a referral to the United States Department of Justice for criminal prosecution (see 26 U.S.C. 7602(c)), but it is undisputed that there has been no such referral here. Neither United States law nor the tax treaty requires as a prerequisite to honoring a request for information under the treaty that it be shown that the foreign government's investigation has not reached a stage analogous to a Justice Department referral. See U.S. Br. 30-38. Accordingly, enforcement of the summons in this case would not be "inconsistent with United States summons enforcement law," and the treaty provisions relied upon by respondents provide no reason to deny enforcement.[1]

Respondents assert (Br. 15-16) that a foreign referral restriction should be read into the language of the tax treaty because it "can be easily applied" (Br. 15). First, of course, a restriction not contained

[1] At one point, respondents suggest (Br. 13) that the district court should inquire not only into whether the Canadian tax investigation had reached a point analogous to a Justice Department referral, but also, more generally, into whether the Canadian investigation suffered from a "lack of civil purpose." The premise of this suggestion is clearly mistaken. The Internal Revenue Code explicitly provides that the purposes for which the IRS may issue a summons "include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws" (26 U.S.C. 7602(b)). Therefore, even if this case involved a domestic summons, the lack of a civil purpose for the investigation would not justify a denial of enforcement on the ground that the summons was issued for an improper purpose. Plainly, respondents err in stating (Br. 13) that the existence of a civil purpose for the foreign investigation is a prerequisite to invocation by a tax treaty partner of the treaty information exchange provisions.

in the treaty should not be read into it no matter how easily it can be applied; that would not be faithful to the intentions of the treaty partners, which in this case were to ease, not restrict, the flow of information. See U.S. Br. 31-33. In any event, respondents are clearly mistaken in stating that a foreign referral restriction could be easily applied. As we explained in our opening brief (at 39-42), the United States has entered into tax treaties with numerous nations whose governments in many cases are structured very differently from our own. Determining when a particular country's investigation has reached a stage analogous to a Justice Department referral in our system would be quite complex in many cases and perhaps impossible where the foreign government lacks the separation between civil and criminal tax authorities that is present in our government. Injecting a foreign referral inquiry into summons enforcement would substantially complicate and delay what is designed to be a summary procedure.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

OCTOBER 1988

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Supreme Court of the United States
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UNITED STATES OF AMERICA,

Petitioner,

v.

PHILIP GEORGE STUART, SR., AND MONS KAPOOR,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS

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INTRODUCTION

This supplemental brief of additional authorities is submitted on behalf of respondents Philip George Stuart, Sr. and Mons Kapoor, pursuant to Rule 35.5 of the Rules of the Supreme Court of the United States.

The principal purpose of this supplemental brief is to bring to the Court's attention a very recent article about

this specific case and the Ninth Circuit's opinion below, authored by Martin H. Scheim and James Cantillon Rose, "*Stuart v. United States:* Standards for Section 7602 Summons in Treaty Matters," 17 *Tax Mngm't Int'l Journal*, No. 11, at 479 (BNA, November 11, 1988). The authors cite and quote extensively from relevant portions of the *Taxation Operations Manual, Special Investigations*, §§ 11(1)7.2(2)(E), *et seq.*, of the Department of Revenue Canada ("Revenue Canada"), and from other pertinent tax cooperation treaties between the United States and Canada, including the *Treaty Between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters*, signed at Quebec City on March 18, 1985; pending ratification by the United States Senate, United States Senate Treaty Document, 100-14 ("The 1985 Criminal Assistance Treaty"). Respondents respectfully submit that these new authorities further support and supplement the arguments contained in the Brief of Respondents in support of the Ninth Circuit's opinion in *Stuart v. United States*, 813 F.2d 243 (9th Cir. 1987).

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ISSUE ON REVIEW

Whether, when requesting court enforcement of an IRS administrative summons under the provisions of Section 7602(a) of the Internal Revenue Code, where the IRS summons was issued to obtain information for a foreign government under the terms of a tax treaty which specifically defers to the revenue laws of the United States, the

IRS should be required to make a *prima facie* showing that the summons was issued for a legitimate purpose, including the absence of a criminal prosecution purpose.

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SUMMARY OF ARGUMENT

The tax article cited by respondents, Scheim and Rose, "*Stuart v. United States:* Standards for Section 7602 Summons in Treaty Matters," 17 *Tax Mngm't Int'l Journal* No. 11, at 479 (BNA, November 11, 1988), provides an insightful analysis into the requirements for an administrative summons issued by the IRS pursuant to Internal Revenue Code Section 7602 (26 U.S.C. § 7602) in response to a request by a treaty partner for information. The practice of the revenue departments of the treaty parties set forth in the article is consistent with the Ninth Circuit's opinion in *Stuart v. United States*, 813 F.2d 243 (9th Cir. 1987), and illuminates the treaty partners' evident intent as manifested by their operating guidelines in making treaty requests, and in their subsequent negotiation of a separate treaty to overcome the limitations of the 1942 and 1980 tax treaties. Further, their practice provides for the consistent treatment of Section 7602(a) enforcement requests in both domestic and treaty cases.

In construing the requirements for an administrative summons pursuant to a treaty request of a foreign government, the courts are guided not only by the treaty language, but also by the practices of the governments involved in applying the treaty. Under the particular treaty involved here, the practice of Revenue Canada, as reflected

in its *Taxation Operations Manual, Special Investigations* § 11(11)7.2(2)(E), *et seq.*, is to refrain from making treaty requests for the exchange of information if there has been a referral by Revenue Canada to the Canadian Department of Justice. This practice recognizes the inability of the IRS to issue a thirty-party summons if Revenue Canada has referred the case for criminal prosecution. Thus, the requirements for a *prima facie* showing set forth by the Ninth Circuit in *Stuart v. United States*, 813 F.2d at 249, are entirely consistent with the practice of the Revenue Services of the two nations under the specific treaty at issue.

The *prima facie* showing required by the Ninth Circuit in its opinion below is also consistent with the obvious intent and purpose of the more recent *Treaty Between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters*, signed at Quebec City on March 18, 1985; United States Senate Document 100-14 ("The 1985 Criminal Assistance Treaty"). In implicit recognition of the criminal referral limitation on the exchange of information under the 1942 (and 1980) Treaty, the 1985 Criminal Assistance treaty provides for the direct exchange of information between the Canadian and United States governments in pending *criminal* matters. Limitations on the exchange of information under the 1942 or 1980 United States-Canada Tax Treaties imposed by Section 7602, when the matter has been referred for criminal prosecution in either country, will be handled in accordance with the new procedures established under the 1985 Criminal Assistance Treaty.

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ARGUMENT

The recent article about this case and the Ninth Circuit's opinion below, by Scheim and Rose, "*Stuart v. United States:* Standards for Section 7602 Summons in Treaty Matters," 17 *Tax Mngm't Int'l Journal* No. 11, at 479 (BNA, November 1, 1988) (hereinafter "the Article"), points out that the existence of a practice on the part of the Canadian and United States governments which corresponds to the *prima facie* showing requirements established by the Ninth Circuit is highly relevant to the construction of the 1942 Treaty at issue here (1942 Canada-United States Income Tax Convention, Articles XIX and XXI). Recognition of the practice of the parties comports with fundamental principles of treaty construction, *TransWorld Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 260 (1984), and with the terms of the Vienna Convention on the Law of Treaties.[1] Article 31(3)(b) of the Vienna Treaty provides that, in construing the terms of a treaty, the parties shall take into account, in addition to the context, any practice followed in the application of the treaty which establishes the agreement of the parties as to the construction of the treaty.

The extent of the limitations arising from the application of United States domestic "revenue laws" in the 1942 Treaty should be determined in the present case by reference to the parties' practices recognizing the limitations imposed on the summons power of the IRS under Section 7602.

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[1]The Vienna Convention on the Law of Treaties has been signed by both the United States and Canada, although only Canada has ratified it to date. The principles reflected in the Treaty, however, are generally accepted as representing customary international law in the interpretation of treaties. 17 *Tax Mngm't Int'l Journal*, No. 11, at 481 (BNA, November 11, 1988).

I. Canadian Tax Investigatory Practices Recognize the Limitation on IRS Summons Powers Under Section 7602 When a Case Has Been Referred for Criminal Prosecution

The authors of the article, *supra*, point out that Revenue Canada's Special Investigations Section Manual entitled *Taxation Operations Manual, Special Investigations* specifically recognizes and accommodates the limitations placed on the summons power of the IRS pursuant to Section 7602:

> In a section on exchange of information under the Treaty, *the Manual notes that the IRS will not issue a third-party summons if the Department has referred its case to Justice. In consequence, the investigator is instructed to ensure that he has obtained all information under the Treaty requiring a summons before referring the case to Justice* [Taxation Operations Manual, Special Investigations, § 11(11) 7.2(2)(E).]

(Emphasis added.) 17 *Tax Mngm't Int'l Journal*, No. 11, at 482.

The above-quoted provisions of the *Taxation Operations Manual, Special Investigations*, make clear that Revenue Canada's own internal procedures and practices: (1) recognize that access to information is denied to the IRS under United States revenue law if there has been a referral for criminal prosecution; and (2) accommodates these limitations imposed by United States revenue law (Section 7602) by making no request of the IRS for the exchange of information after referral to the Canadian Department of Justice for criminal prosecution. The IRS defers to Canadian law when making requests of Revenue Canada under the treaty. *Cf. United States v. A.L. Burbank & Co., Ltd.*, 525 F.2d 9, 14-15 (2d Cir. 1975), *cert. denied*, 426 U.S. 934 (1976); Internal Revenue Manual § 9265.2(2) (1983) (IRS should provide adequate background to support a simultaneous Canadian tax interest because Canadian tax authorities are authorized to furnish only that information which they can obtain under the revenue laws of Canada).

The practices of both governments under the 1942 Treaty assume that if information requested of the other government under the treaty is not available to the requested tax authority under its own domestic laws, it cannot be made available to the requesting government. The Canadian taxing authority recognizes that under the United States domestic revenue laws, the IRS may not obtain enforcement of an administrative summons after a referral of a domestic case for prosecution and, accordingly, that a referral for criminal prosecution in Canada bars a treaty request for information from the IRS.

In the opinion below, *Stuart v. United States*, 813 F.2d 243, 249 (9th Cir. 1987), the Ninth Circuit's formulation of a two-part test necessary to a *prima facie* showing parallels Revenue Canada's view of the limitations upon requests for information available under our domestic revenue laws, and therefore imposes no additional burden on the Canadian government. It does not interfere in any way in its internal governmental affairs, and is in keeping with the existing practice and procedure of Revenue Canada in its interpretation of the 1942 Treaty. The "revenue laws" of the United States, specifically deferred to by the language of the treaty, do not permit IRS access to information pursuant to Section 7602 in a domestic

case unless there is, in fact, an absence of a criminal prosecution referral, 26 U.S.C. § 7602(c), and, therefore, a "legitimate purpose." There is no justification in practice or in the language of the treaty for a difference in procedure between domestic and treaty cases. Without responses to the two-part test set forth by the Ninth Circuit, the IRS—and therefore the Canadian government—has failed to make out even a *prima facie* showing for court enforcement of its administrative summonses in the present cases.

II. The 1985 Treaty on Mutual Legal Assistance in Criminal Matters Evidences the Treaty Partners' Intent to Fill the Void Left by Civil Income Tax Liability Exchange Provisions of the 1942 (and 1980) Treaty.

Further evidence, consistent with the construction given by the Ninth Circuit in *Stuart v. United States, supra,* that the United States and Canadian governments did not intend that the 1942 (and 1980) United States-Canada Income Tax Treaty be used for the sole purpose of criminal prosecution is the negotiation and signing of a new treaty in 1985. The *Treaty Between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters*[2] ("the 1985 Criminal Assistance Treaty") provides an additional framework for cooperative efforts by the Canadian and United States governments with respect to the *criminal*

[2]The 1985 Treaty was signed by the United States and Canada on March 18, 1985, in Quebec City, Quebec, Canada. The 1985 Treaty awaits United States Senate ratification. *See* United States Senate Treaty Document, 100-14.

enforcement of tax laws. The 1985 Treaty provides for mutual legal assistance in all matters relating to the investigation, prosecution and suppression of "offences." The 1985 Criminal Assistance Treaty, Article II(1). Although comparable in many respects to the 1942 and 1980 United States-Canada Income Tax Treaties, the 1985 Treaty differs principally in that it deals specifically with ongoing investigations and prosecutions of *criminal* matters, and provides for exchange of information directly between the United States Attorney General and Canadian Minister of Justice ("the Central Authorities"). The 1985 Criminal Assistance Treaty, Article I.

The article, *supra*, discusses the importance of the 1985 Criminal Assistance Treaty in filling the gap in information-gathering created by Section 7602:

> The 1985 Treaty expressly provides that the Parties may provide assistance pursuant to agreements other than the 1985 Treaty. [1985 Treaty, Article III(1).] *The implication therefore is that the Parties may use the 1985 Treaty instead of the other agreement if this is more appropriate or convenient. In this sense, the 1985 Treaty would be available to the two countries in tax matters in cases where the file has already been referred by the tax authority to the requesting State's Department of Justice for prosecution* and therefore is no longer in the hands of the competent authority as defined under the Tax Treaty.

(Emphasis added.) 17 *Tax Mngm't Int'l Journal*, No. 11, at 485 (BNA, November 11, 1988).

The 1985 Criminal Assistance Treaty fills the gap left by the 1942 (and 1980) Income Tax Treaties insofar as their information exchange provisions are limited by

the restrictive terms of Section 7602 for enforcement. Since, under Section 7602(c), the IRS cannot obtain information by an administrative summons after referral for criminal prosecution, and because this limitation is expressly incorporated in Articles XIX and XXI of the 1942 Treaty (and 1980 Treaty) by use of the term "revenue laws," it must be concluded that the 1985 Treaty was intended to provide information exchange powers broader than those contemplated by the civil tax liability purposes of the 1942 and 1980 Treaties, but subject to the appropriate protections applicable in criminal matters.

The holding and reasoning of the Ninth Circuit in these consolidated cases, making a clear distinction between civil revenue cases and criminal prosecution cases, whether arising from treaty requests or domestically, are supported by the negotiation and signing of the 1985 Treaty. That treaty is an acknowledgment of the importance of the dichotomy between civil and criminal matters and procedures.

Where, as here, the IRS requests court enforcement of its administrative summons under the provisions of the 1942 or 1980 civil tax treaties, the *prima facie* showing requirements of the Ninth Circuit, including the absence of a criminal prosecution purpose, reflect the intent and practice of the treaty partners. The Ninth Circuit's approach is a reasonable interpretation of the language and intent of the treaties; it does not interfere in the internal affairs of Canada; it maintains the important distinction between civil and criminal matters; it adequately accommodates the interplay between United States "revenue laws" (i.e., Section 7602) and the underlying purposes of

the treaties; and is consistent with the apparent intent of the 1985 Criminal Assistance Treaty.

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CONCLUSION

The judgment of the court of appeals should be affirmed in its entirety.

Respectfully submitted,

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